

**Anchoring a subsidiarity and proportionality review by the
Court of Justice of the European Union in the context of residency
rights and shared competence: a legal, doctrinal and critical
analysis**

A thesis submitted for the degree of Doctor of Philosophy

by

Katherine Shaw, LLB (Hons) (Exeter), LLM (Leicester), FHEA

School of Law

Brunel University June 2015

Abstract

The thesis adopts a doctrinal approach to consider how a subsidiarity and proportionality review by the CJEU could be applied to shared competences, and the criteria that the CJEU should take into account in balancing competing interests when determining the residency rights of EU citizens. It will identify limits to the competences of the EU through subsidiarity analysis, including how this should constrain the reasoning of the CJEU, but this has a consequence of better legitimising such genuinely European standards that do have a clear legal basis. Adhering to the rule of law is an important issue for the CJEU to demonstrate its respect for as a core value commonly associated with democracy and with the validity of law itself. A subsidiarity review undertaken by the CJEU involving the CJEU checking whether the Union has competence to act (conferral) and in cases concerning areas of shared competence would also serve to legitimise the CJEU's ruling to the Member States and address the problem of ultra vires EU action lacking legitimacy in the perspective of the Member States eyes. Adopting a normative approach it considers how a subsidiarity and proportionality review could be anchored in EU law to address competence issues when the CJEU is striking a balance between fundamental principles of EU law, the Charter of Fundamental Rights and the residency rights of migrant EU citizens who are economically inactive. As subsidiarity in these types of cases relates to the cross border requirement, the CJEU should be explicit about departing from the purely internal rule as well as explaining the substance of rights of EU citizens. The proportionality element of the review relates to the actual consideration and weighing up by the CJEU of the competing interests identified in this context. This requires the CJEU to identify explicitly in its reasoning any competing interests that have been weighed up as well as stating any other particular factors involved in the balancing and the weight accorded to those factors. Although such an approach would not necessarily result in a change in the outcome of the case, it would help to improve the quality of the reasoning of the CJEU and consequently enhance the legitimacy of the CJEU's ruling.

CONTENTS

Abstract	2
Contents	3
Acknowledgements	7
Chapter 1 Subsidiarity and Proportionality as twin constitutional principles for mediating the balance of power between the EU and the Member States	8
1. Introduction to thesis	9
2. Competence, conferral and the principle of subsidiarity	20
3. Scope of thesis	33
4. Sources and methods	43
5. Chapter overview	47
6. Preliminary conclusions	55
 Chapter 2 Subsidiarity and Proportionality as twin constitutional principles for mediating the balance of power between the EU and the Member States	 63
1. Introduction	63
2. Subsidiarity as a key constitutional principle for mediating the balance of power between the EU and the Member States	70
2.1 Introduction	70
2.2 The Adoption of subsidiarity as a legal and constitutional principle by the EU to limit unnecessary EU intervention	75
3 Proportionality as a widely recognised concept used as a test in judicial review	78
3.1 Introduction	78
3.2 Proportionality as a widely recognised concept used as a test in judicial review of public acts at national level	85
3.3 The differing interpretations of the operationalization of proportionality	85

3.4 Differing levels of intensity of judicial review by the CJEU of national restrictions in light of the proportionality principle depending on the type of case being considered	92
4 Subsidiarity and Proportionality in EU law-making in shared areas of competence	102
4.1 A conceptual link between conferral, subsidiarity and proportionality	102
4. 2 Subsidiarity alongside proportionality in EU law-making in shared areas of competence	103
5 Is EU Subsidiarity an essentially contested concept	108
6 Subsidiarity and the introduction of the yellow card procedure following the Treaty of Lisbon	119
7 Conclusion	129
 Chapter 3 Should subsidiarity and proportionality as twin constitutional principles in EU law-making, bind the CJEU as law-maker in its interpretation of shared competence areas and, if so, what can be agreed at European level?	133
1. Introduction	133
2. Subsidiarity and judicial review by the CJEU of the political institutions	139
2.1. Introducing the CJEU: a unique supranational court	139
2.2. The CJEU: its pro-union interpretative tendency and accusations in the literature of activism	147
2.3. Subsidiarity and judicial review by the CJEU of the political institutions	165
3. How to apply Kumm's argument that the CJEU should operationalize subsidiarity by employing subsidiarity and proportionality applied to competences as a tool of judicial review	178
4. Academic support that the CJEU as a law-making institution should be bound by subsidiarity when reviewing cases in the context of the common market.	190

5. Is it possible to identify more fully ex ante criteria for the application of subsidiarity thereby enabling the CJEU to engage more meaningfully with subsidiarity in its judicial reasoning in areas of shared policy outside of judicial review?	197
6. Conclusion	207
Chapter 4 The fundamental status of EU citizenship and the determination of residency rights of EU citizens by the CJEU	210
1. Introduction	211
2. Theoretical Perspectives: the concept of citizenship and its link to political identity which in an EU context means that the competence must be necessarily shared with the Member States	224
2.1 Introduction	224
2.2 The concept of citizenship and its link to political identity which in an EU context means that the competence must be necessarily shared with the Member States	225
2.3 The limits of EU citizenship	227
2.4 The problems of differing levels of protection from expulsion for different categories of EU citizens	232
2.5 Conclusion	237
3. Legal Perspectives – EU citizenship, the CJEU and the fundamental status of EU citizenship and residency rights in Directive 2004/38	239
3.1 Introduction	239
3.2 The Introduction of EU citizenship provisions following the Treaty of Maastricht	240
3.3 The strengthening of residency rights for EU citizens in Directive 2004/38	242
3.4 The CJEU, the fundamental status of EU citizenship and residency rights of EU citizens	253

3.5 The reaffirming and strengthening of the residence rights of EU citizens by the Treaty of Lisbon in light of the Charter of Fundamental Rights	268
4. The failure of the CJEU to undertake a subsidiarity and a proportionality review by the CJEU when determining the residency rights of EU citizens following the Treaty of Lisbon	276
5. Conclusion	277
Chapter 5 The anchoring of a subsidiarity and proportionality review by the CJEU when determining the residency rights of EU citizens following the Treaty of Lisbon	279
1. Introduction	279
2. The shift in the case law of the CJEU from discrimination to the fundamental status of Citizenship	290
3. Could a subsidiarity and proportionality review be helpful here and, if so, what criteria should such a review involve?	315
4. How should the CJEU more meaningfully engage with subsidiarity in its judicial reasoning	318
5. Conclusion	325
Chapter 6 Conclusion	330
Appendix 1 Table of Treaties, Instruments and Legislation	341
Appendix 2 Table of Cases	344
Appendix 3 Bibliography	351

Acknowledgements

Thanks are owed to a number of individuals for their invaluable advice and assistance in the course of my PhD studies.

I would like to thank first and foremost my primary supervisor Dr Gerard Conway, Brunel University, for his exemplary help and advice as my supervisor especially in the final part of my PhD studies. I would also wish to thank those at the Universities of York, Leeds, Liverpool who have provided advice and guidance at various points throughout my PhD studies

Final thanks must go to my family and in particular my husband Mark who has been a continual source of encouragement and support throughout my PhD studies.

Chapter 1

Anchoring a subsidiarity and proportionality review by the Court of Justice of the European Union in the context of residency rights and shared competence: a legal, doctrinal and critical analysis.¹

1. Introduction to thesis
2. Competence, conferral and the principle of subsidiarity
3. Scope of thesis
4. Sources and methods
5. Chapter overview
6. Preliminary conclusions

1. Introduction to thesis

EU citizenship has been proclaimed by the Court of Justice of the European Union (CJEU) to have fundamental status in EU law² despite the modest provisions in the Treaty which include requiring having national citizenship as a prerequisite for having EU citizenship.³ Furthermore, the rights attaching to EU citizenship under the Treaty are closely allied to those who are economically active when exercising their right of free movement⁴ with the most extensive

¹ See also a conference presentation by the author of this thesis entitled, 'Subsidiarity, an inherent respect for localism and the Court of Justice of the European Union', at the Socio-Legal Studies Association Conference 26-28 March 2013 at York Law School, York University. For the purposes of that paper and For the purposes of that paper and this thesis 'localism' is taken as defined as meaning law-making at a local level this thesis 'localism' is taken as defined as meaning law-making at Member State level.

² *Grzelczyk v Centre public D'Aide Sociale D'Ottignies-Louvain-La-Neuve* (Case C-184/99) [2002] 1 CMLR 19 para 1.

³ Article 20 TFEU.

⁴ Article 21 TFEU.

residency rights being given to those citizens who are workers.⁵ Despite such Treaty limitations, the CJEU has in a series of cases gradually expanded the rights of EU citizens even where those citizens are non-economically active.⁶ *Sala* is one of the most radical of the early case examples where the CJEU adopted such a teleological approach to the interpretation of the citizenship provisions and, in particular, made significant inroads into the idea that nationals of the Member States exercising their right of free movement must be economically self-sufficient and must not become a burden on the host Member State.⁷ This has led to claims of judicial activism⁸ and the consequent risk of damaging the legitimacy of the CJEU. As Everson explains, ‘The systematic legitimacy of European law is undermined as the Court responds sympathetically, but arbitrarily, to adverse individual circumstance. The credibility of European law is strained as the Court acts as a unilateral constitutional actor, transforming EU citizenship from a status that is ancillary to national citizenship to one which has substance of its own.’⁹

On the other hand, one could argue that the EU should not be driven solely by economic concerns. The Preamble to the Treaty on the European Union confirms the EU’s ‘attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law’.¹⁰ Furthermore, the quest for enhancing the legitimacy and democracy of the EU and its citizens’ demands recognition of the fundamental status of EU citizenship¹¹ and the CJEU is expressing this but without elaborating in much detail what such a status should entail.

With this in mind, this thesis undertakes a legal, critical and doctrinal analysis of the determination of the residency rights of EU citizens who are economically

⁵ See also the discussion of the distinction drawn between economically active and economically inactive EU citizens in relation to residency rights given to EU citizens in Directive 2004/38 in chapter 4 of this thesis.

⁶ See for example Case C-85/96 *María Martínez Sala v Freistaat Bayern* [1998] ECR I-2691 and the discussion of this case in chapters 4 and 5 of this thesis.

⁷ Case C-85/96 *María Martínez Sala v Freistaat Bayern* [1998] ECR I-2691.

⁸ The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment’, (2010) 6(1) *Hanse Law Review* 3-26 at 7: < <http://www.hanselawreview.org/pdf9/Vol6No01Art01.pdf> > last accessed 14.1.14

⁹ M.Everson, ‘A very cosmopolitan citizenship; but who pays the price?’, in M.Dougan, N.Nic Shuibhne, E.Spaventa, (eds), *Empowerment and Disempowerment of the European Citizen*, (2012, Hart publishing) 147-8.

¹⁰ Preamble to the Consolidated version of the Treaty on European Union OJ C 83, 30.3.2010 reproduced in K.Shaw, *European Law Statutes*, (2nd ed., Pearson Education Limited, 2014) at 3.

¹¹ See chapter 5 for discussion of how citizenship is a fundamental political concept at national level.

inactive in the context of regulating shared competence¹² i.e. where both the EU and the Member States share power to legislate in particular policy area. This will involve a consideration of what can be agreed at European level not only in terms of protecting the fundamental status of EU citizenship in this context but also looking at this in the broader constitutional principles of the EU's legal system. In particular, this includes considering not only the role that the Charter of Fundamental Rights should play but also how the CJEU could enhance the legitimacy of its decision making by including in its judgement how it has balanced the supranational concern with integration¹³ in policy areas where it shares competence with the Member States¹⁴ with other constitutional values, including democracy and respect for localism.

Pivotal in the context of regulating the EU's exercise of shared competence in all shared policy areas are the constitutional principles of subsidiarity and proportionality. These key constitutional principles governing the EU's exercise of competence in all shared competence areas currently find expression as legal rules in Article 5 TEU. This latter provision provides in Article 5 (3) and (4) TEU that,

‘under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol. 4. Under the principle of proportionality,

¹² Article 5 TEU.

¹³ For the purposes of this thesis, the definition of European legal integration offered is namely ‘the gradual penetration of EU law into the domestic law of its Member States’, A.M.Burley and W.Mattli, ‘Europe before the Court: A Political Theory of Legal Integration’, (1993) 47(1) *International Organisation* 41-76 at 43. See also P.Craig and G. de Búrca, *EU law Text, Cases and Materials*, (5th. Ed., Oxford, OUP, 2011) at chapter 1 for a discussion of the evolution of European integration and the theories put forward to explain this evolution as a series of distinct phases. For account of the rival theories of European legal integration and a discussion of their differing ontological scope i.e. how they differ in what they mean by integration see, for egs, A.Wiener and T.Diez, (eds) *European Integration Theory*, (2nd ed., OUP, 2012).

¹⁴ Article 4(2) of the Treaty Establishing the European Union (TEU).

the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality’.

Article 5 (3) TEU, in conjunction with a Protocol on subsidiarity and proportionality¹⁵, thus sets out a test that the EU institutions should carry out before exercising competence in all shared competence areas, specifically that if the Member States cannot exercise competence efficiently enough then the EU should take action. The Protocol further requires the EU to provide justification for legislation in terms of subsidiarity, as a mechanism to guide the exercise of competence by the EU

However, despite subsidiarity and proportionality being key constitutional principles and rules in EU law governing the exercise of EU competence in all areas of shared competence,¹⁶ this thesis will point out how the CJEU has failed to engage with subsidiarity and proportionality applied to competences as a tool of judicial review¹⁷ when interpreting cases in shared policy areas involving the residency rights of EU citizens who are economically inactive.

Adopting a doctrinal approach¹⁸ and agreeing and building upon arguments by de Búrca¹⁹ and Kumm²⁰ the central question in this thesis is how the CJEU could operationalise a subsidiarity and proportionality review applied to competences in this specific context. For the determination of residence rights of EU citizens who are economically inactive is an area which involves both EU competence and the Member States competence i.e. shared competence. Consequently in these types of cases, including cases which also touch upon policy areas which are designated as supporting competences,²¹ the CJEU needs to undertake a subsidiarity

¹⁵ (Protocol on the application of the principles of subsidiarity and proportionality, Consolidated Texts of the EU Treaties as amended by the Lisbon Treaty, pages 204 to 207 (Cm 7310).

¹⁶ Article 5 TEU.

¹⁷ M.Kumm, (2006) ‘Constitutionalising subsidiarity in Integrated Markets: the Case of Tobacco Regulation in the European Union’ (12(4) ELJ 503-533.

¹⁸ See T.Hutchinson and N.Duncan, ‘Defining and Describing What We Do: Doctrinal Legal Research’, (2012) 17 (1) Deakin Law Review, 84-119 and section 4 of this chapter for further discussion of doctrinal legal research and the rationale for the choice of this approach in this thesis.

¹⁹ G.De Búrca, ‘The Principle of Subsidiarity and the Court of Justice as an Institutional Actor’, (1998) 36(2) Journal of Common Market Studies pp. 217-35.

²⁰ M.Kumm, (2006) ‘Constitutionalising subsidiarity in Integrated Markets: the Case of Tobacco Regulation in the European Union’ (12(4) ELJ 503-533.

²¹ Article 2 (5) TFEU provides that ‘in certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or

review. The fact that questions relating to EU citizenship sometimes also touch upon some issues in policy areas which are on the edge of the EU's competence²² or involve supporting competences²³, this, it is submitted, further strengthens the argument for the CJEU to undertake a subsidiarity review in areas involving EU citizenship. Not only is the EU acting on the edge of its competence when considering questions relating to EU citizenship in those areas but more generally such supporting competences are also more protective of State sovereignty in that Member State competence is meant to be preponderant. Even where there is no change in case outcomes an explicit explanation of how the CJEU had considered subsidiarity in the CJEU's reasoning would help to improve the quality of the reasoning of the CJEU and consequently enhance the legitimacy of the CJEU's ruling.²⁴

Thus the question of how the CJEU could operationalise a subsidiarity and proportionality review applied to competences in when determining the residency rights of EU citizens are economically inactive is an important doctrinal legal question. For subsidiarity has recently been reaffirmed in the Treaty of Lisbon as a key constitutional principle of EU law to guide EU law-making in shared competence areas.²⁵ Its use by the EU law making institutions when law-making in shared policy areas helps to demonstrate the democratic and efficient function²⁶ of the exercise of the EU's legislative power to the Member States. The EU also acts on the basis of defined competence rules which demonstrate the EU

supplement the actions of the Member States, without thereby superseding their competence in these areas. Legally binding acts of the Union adopted on the basis of the provisions in the Treaties relating to these areas shall not entail harmonization of Member States' laws or regulations'. Article 6 TEU specifies these areas as being industry, culture, tourism, education, vocational training, youth and sport, civil protection and administrative co-operation.

²² E.g. immigration (Article 79 and 80 TFEU) or welfare (Article 3(3) TFEU)

²³ Article 2 (5) TFEU provides that 'in certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas. Legally binding acts of the Union adopted on the basis of the provisions in the Treaties relating to these areas shall not entail harmonization of Member States' laws or regulations.' This type of competence is discussed further in section 2 of this chapter.

²⁴ N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.'

²⁵ Article 5 TEU and in particular Article 5 (3) which refers to competence outside exclusive competence when it provides that 'Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

²⁶ See the Preamble to the Treaty of Lisbon which includes 'DESIRING to enhance further the democratic and efficient functioning of the institutions so as to enable them better to carry out, within a single institutional framework, the tasks entrusted to them'.

institutions adherence to the rule of law,²⁷ the latter being enshrined in Article 2 TEU. The EU rule of law itself is also argued by Weiler to be a constitutional principle of EU law²⁸ despite the fact that, ‘the Court of Justice, as the ultimate guardian of the Union legal order, is free to give an autonomous meaning to the EU principle of the rule of law even though the Court generally seeks to identify a common denominator in the constitutional traditions of the Member States when making use of a concept which was first developed at the national level’.²⁹

The rule of law is also a widely recognised aspirational principle at national³⁰ and international level³¹ as evidenced in both the European Convention of Human Rights³² and the preamble to the Statute of the Council of Europe.³³ Furthermore, although the rule of law³⁴ is not a universal concept with a clear definition³⁵, ‘the

²⁷ For further discussion see B.Tamanaha, *On the Rule of Law: History, Politics, Theory*, (Cambridge University Press, 2004).

²⁸ J.Weiler, *The Rule of Law as a Constitutional Principle of the European Union*, Jean Monnet Working Paper No 4 (New York, 2009) at 7 and at 3 where he also refers to how the CJEU itself has referred to the EC as a ‘community based on the rule of law’ in Case 294/93, *Les Verts v Parliament* [1986] ECR 1339, para 23 and at 4 how ‘Indeed the rule of law, which is regularly equated with the idea of a “government of laws, not men”, is generally assumed...to be a “good thing”’. This undoubtedly explains why the court of Justice, in stressing the importance of the rule of law as a defining element of the EC’s constitutional character, did not encounter much criticism’.

²⁹ J.Weiler, *The Rule of Law as a Constitutional Principle of the European Union*, Jean Monnet Working Paper No 4 (New York, 2009) 47 and at 15 where he points out that AG Mancini in Case 294/93, *Les Verts v Parliament* [1986] ECR 1339 ‘seems to equate it with the notion of judicial protection or control.’

³⁰ See the recent case *AXA General Insurance Limited and others (Appellants) v the Lord Advocate and Others (respondents) (Scotland)*, [2011] UKSC 46 where Lord Hope emphasises the importance of the rule of law for the judiciary when he states at para 51 that ‘the rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise’.

³¹ See also the Lord Chief Justice, the Right Honourable, the Lord Thomas of Cwagiedd, ‘Welcome Address: Global Law Summit’, < <http://www.judiciary.gov.uk/wp-content/uploads/2015/02/gls-speech-feb-2015.pdf> > accessed 5.3.15 and who points out how ‘the rule of law is the foundation stone on which a just society has grown and flourished’.

³² European Treaty Series No 5.

³³ European Treaty Series No 1.

³⁴ For the seminal definition of the core components of the rule of law see A.Dicey, *Introduction to the Study of the Law of the Constitution*, (7th ed. London/New York: Macmillan and Co, 1907). These include firstly at 198 ‘absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, [which] excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government’. Secondly at 198, ‘equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts’. Thirdly, at 199 ‘with us under the law of the constitution, the rules which in foreign countries, naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts’. For a more recent discussion of the rule of law see B.Tamanaha, *On the Rule of Law: History, Politics, Theory*, (Cambridge University Press, 2004) and Lord Bingham, *The Rule of Law*, (Penguin, 2011).

fundamental issue that the rule of law seeks to address is: who guards the guardians: Who ensures that they use the powers we have granted them to protect us, in an appropriate, just and fair manner, and that we never need to be protected from them?’³⁶

The rule of law has been widely recognised from a procedural viewpoint³⁷ as including government under the law³⁸ and encompassing various formal characteristics entailed in the objectivity of the law. As Fallon argues such formal characteristics include,

‘The capacity of legal rules, standards or principles to guide people in the conduct of their affairs; Efficacy. The law should actually guide people; Stability. The law should be reasonable stable, in order to facilitate planning and coordinated action over time; Supremacy of legal authority. The law should rule officials, including judges as well as ordinary citizens; Impartial justice. Courts should be available to enforce the law and should employ fair procedures’.³⁹

The rule of law and its key tenet of government under the law is specifically provided for in relation to the EU in Article 2 TEU in that the EU is bound by the principle of conferral which denotes a system where the EU institutions can exercise only competence attributed to it.

On the other hand, despite their importance as key constitutional principles governing the EU’s exercise of shared competence, judicial review of subsidiarity

³⁵ See F.Amtenbrink, *Observing the Rule of Law in the European Union*, (2009) *Erasmus Law Review* at Vol 2(1) who argues, ‘the concept of the rule of law is anything but well-defined, despite its wide acceptance and application....different approaches have been identified in the relevant literature which categorise the several and sometimes rather diverse elements into formal, substantive and functional definitions of the rule of law’.

³⁶ Dr P Marsden, ‘Checks and balances: EU competition law and the rule of law’, (February 2009) *Competition Law International* at 1.

³⁷ See also D.Kochenov, *The EU Rule of Law: Cutting Paths Through Confusion*, (2009) *Erasmus Law Review* at 8, who argues that in addition to a formal or procedural approach to the rule of law, there is also a wider substantive approach to the rule of law. This approach goes beyond looking at procedural matters but also considers that ‘the rule of law can only exist if the legal system in question embraces a particular public morality, the laws being valued for the content: namely a clear distinction is made between good and bad laws’.

³⁸ See further the Rt Hon Lord Bingham of Cornhill KG, House of Lords, Sixth Sir David Williams Lecture: the Rule of Law (2006) University of Cambridge, Centre for Public Law Available at http://www.cpl.law.cam.ac.uk/past_activities/the_rt_hon_lord_bingham_the_rule_of_law.php accessed 14.7.14 and also K.Popper, *The Open Society and Its Enemies*, (Princeton: Princeton University Press).

³⁹ R.Fallon, ‘The rule of Law as a concept in Constitutional Discourse’, (1997) *Columbia law Review* 1-56 at 1.

and proportionality applied to competences has been argued to be frequently light touch⁴⁰ and in cases in some shared policy areas there has been no explicit subsidiarity review at all. So, for example, the current author points out that to date the CJEU has paid little attention to subsidiarity and proportionality applied to competences and a respect for localism in citizenship cases concerning the rights of EU citizens who are economically inactive⁴¹ even though in such cases there are frequently sensitive immigration issues or entitlement to welfare issues on the borderline of EU competences.⁴² However, if the CJEU were to undertake a subsidiarity and proportionality review which involved a consideration of the limits and scope of EU competence in a particular shared competence area, even where there is no change in case outcomes an explicit explanation of how the CJEU had considered subsidiarity in the CJEU's reasoning would help to improve the quality of the reasoning of the CJEU and consequently enhance the legitimacy of the CJEU's ruling.⁴³ It would also demonstrate its adherence to the rule of law,⁴⁴ the latter being enshrined in Article 2 TEU.⁴⁵ Adhering to the rule of law is an important issue for the CJEU to demonstrate its respect for a core value commonly associated with democracy⁴⁶ especially when considering cases which involve societal change where there are differing legal regimes and views such as, for example, in the context of cases concerning same sex marriage,⁴⁷ cases involving the interpretation of the concept of a human embryo for the purposes of Directive 98/44⁴⁸ or cases involving maternity leave protection.⁴⁹ The rule of law

⁴⁰ See chapter 3 for further discussion.

⁴¹ See for example Case C-85/96, *Martinez Sala v Freistaat Bayern*, [1998] ECR I-2691

⁴² See Chapter 4 and 5 for further discussion.

⁴³ N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.'

⁴⁴ For further discussion see B.Tamanaha, *On the Rule of Law: History, Politics, Theory*, (Cambridge University Press, 2004).

⁴⁵ See also K.Lenaerts, 'Upholding Union Values in Times of Societal change: the Role of the Court of Justice of the European Union'. <https://www.dur.ac.uk/resources/deli/events/annual%20lecture%202014/Lenaerts_2014_Durham.pdf>accessed 1.7.14.

⁴⁶ For further discussion see B.Tamanaha, *On the Rule of Law: History, Politics, Theory*, (Cambridge University Press, 2004).

⁴⁷ See also K.Lenaerts, 'Upholding Union Values in Times of Societal change: the Role of the Court of Justice of the European Union'. <https://www.dur.ac.uk/resources/deli/events/annual%20lecture%202014/Lenaerts_2014_Durham.pdf>accessed 1.7.14 at 9 citing Case C-267/06 *Maruko* [2008] ECR I-1757 and Case C-147/08 *Romer* [2011] ECR I-3591.

⁴⁸ *Ibid.*, at 11 citing case C506/06 *Mayr* [2008] ECR I-1017.

⁴⁹ *Ibid.*, at 7 citing case C-104/09 *Roca Álvarez* [2010] *ECRI-8661*. See also more generally a case note on Case C-104/09 *Roca Álvarez* 30 Sept 2010 [2010] 1-08661 by K.Shaw 'The case of *Álvarez* and the boomerang effect of maternity leave', (2013) 19 (2) *Web Journal of Current*

is a neutral arbiter; it avoids the judiciary having to make substantive moral choices themselves. It would also help to counter claims that the CJEU has an unjustified emphasis on an ever closer Union and ignores the Member States local law especially in cases involving sensitive immigration⁵⁰ or entitlement to welfare issues.⁵¹ Where the EU has competence to act in an area of shared competence, Article 5 TEU provides that the EU must observe the principles of conferral, subsidiarity and proportionality.⁵² All three of these principles are therefore conceptually linked. Furthermore, all three principles succeed each other and as Kumm argues, all these principles have a central constitutional role in the protection of federalism values in the EU: they decide the balance of authority and power.⁵³ Subsidiarity review undertaken by the CJEU involving the CJEU checking whether the Union has competence to act (conferral) and in cases concerning areas of shared competence would serve to legitimise the CJEU's ruling in the eyes of the Member States by demonstrating its respect for Member State autonomy. This is consistent with the EU's overarching aim to have democratic, transparent and efficient institutions through the adherence to values commonly associated with democracy. For, and as expressed in the Laeken Declaration

‘The European Union derives its legitimacy from the democratic values it projects, the aims it pursues and the powers and instruments it possesses. However, the European project also derives its legitimacy from democratic, transparent and efficient institutions’.⁵⁴

Efficiency and democracy work together here: the EU should only act when it can add value, since lower-level decision-making is more democratic if there is no efficiency advantage at EU level.

Legal Issues; E.Caracciolo di Torella, ‘Brave New Fathers for a Brave New World? Fathers as Caregivers in an evolving EU’, 20(1) 2014 European Law Journal 88-106.

⁵⁰ C-34/09 *Gerardo Ruiz Zambrano v Office National de L'Emploi* (ONEM), [2011] ECR I-1177.

⁵¹ See for example Case 333/13, *Elisabeta Dano v Jobcenter Leipzig*.

⁵² Subsidiarity is most important re shared competences because of the major impact of the latter – when exercised, shared competence eliminates Member State competence in the same area.

⁵³ M.Kumm, (2006) ‘Constitutionalising subsidiarity in Integrated Markets: the Case of Tobacco Regulation in the European Union’ (12(4) ELJ 503-533 at 531.

⁵⁴ Laeken Declaration <http://europa.eu/rapid/press-release_PRES-01-902_en.htm> accessed 4.7.14.

With this in mind, this thesis adopts a doctrinal approach to consider how a subsidiarity and proportionality review applied to competences could be anchored by the Court of Justice of the European Union when determining the residency rights of EU citizens'. It includes an examination of the use of subsidiarity and proportionality⁵⁵ as key twin concepts in EU law for mediating the balance of power between the EU and the Member States in areas of shared competence⁵⁶ in the context of residency rights of EU citizens.⁵⁷ It also includes an argument that although subsidiarity is an essentially contested concept, applying Gallie's criteria for determining essential contestation, that it is possible to anchor as a meaningful tool of legal reasoning in the case law of the Court of Justice of the European Union (CJEU)⁵⁸ when dealing with cases determining the residency rights of EU citizens by determining what could be agreed at European level. On the other hand, where there is conceptual dissonance, this, it will be further argued, favours judicial discretion on how it should be applied. This raises the question of how subsidiarity, as a contested concept could be anchored in EU law by the Court of Justice of the European Union (CJEU) to help ensure not only the proper respect for local law-making in areas of shared competence but also determining what could be agreed upon at European level in terms of protecting the fundamental status of EU citizenship when dealing with cases involving the residency rights of EU citizens. To date, the CJEU has not elaborated on how it exercises this discretion.

⁵⁵ Subsidiarity and proportionality currently find expression as legal rules in Article 5 TEU. Under the principle of proportionality, which is discussed in further detail in chapter 2, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality'. Article 5 (3) TEU, in conjunction with a Protocol on subsidiarity and proportionality (Protocol on the application of the principles of subsidiarity and proportionality, Consolidated Texts of the EU Treaties as amended by the Lisbon Treaty, pages 204 to 207 (Cm 7310), thus sets out a test that the EU institutions should carry out, specifically that if the Member States cannot exercise competence efficiently enough then the EU should take action. The Protocol further requires the EU to provide justification for legislation in terms of subsidiarity, as a mechanism to guide the exercise of competence by the EU.

⁵⁶ Chapter 2 of this thesis focuses on exploring subsidiarity and proportionality as twin constitutional principles in EU law making in shared areas of competence.

⁵⁷ See further 'The Stockholm Programme – an open and secure Europe serving and protecting citizens', OJ 2010/C 115/01 where it is stated that 'The right to free movement of citizens and their family members within the Union is one of the fundamental principles on which the Union is based and of European citizenship'. See also chapter 5 of this thesis for a discussion of how a subsidiarity review could address competence issues when the CJEU is considering competing fundamental principles of EU law such as an EU citizens' right to residency.

⁵⁸ W.B.Gallie, 'Essentially Contested Concepts', (1956) Proceedings of the Aristotelian Society 167-98.

So the thesis seeks to identify limits to the competences of the EU⁵⁹ through subsidiarity analysis, including how this should constrain the reasoning of the CJEU, but this has a consequence of better legitimising such genuinely European standards that do have a clear legal basis as an explicit explanation of how the CJEU had considered this would help to improve the quality of the reasoning of the CJEU and consequently enhance the legitimacy of the CJEU's ruling.⁶⁰ Adopting a doctrinal perspective and agreeing with and building upon literature by De Búrca⁶¹ and Kumm⁶², the primary objective of this thesis therefore is to put forward an original argument at the level of synthesis and application as to how this could be achieved. Firstly by agreeing with and developing an argument in chapter 3 by Kumm of how the CJEU could operationalise subsidiarity by employing subsidiarity and proportionality applied to competences as a tool of judicial review.⁶³ As Kumm argues a subsidiarity and proportionality review involves considering whether there should be a legitimate purpose for Union intervention explicitly stated and evidenced as required by Article 5(2) TEU. The latter article requires that 'the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by Member States...but rather, by reason of the scale or effects of the proposed action, be better achieved at the Union Level.'⁶⁴

Furthermore, Kumm argues, with reference to the *Tobacco Advertising* and *Working Time cases*,⁶⁵ that a subsidiarity and proportionality review involves considering whether that the Union internal market measure decided upon by the

⁵⁹ For a recent discussion of how competences could be restored to the Member States see R. Zbiral, 'Restoring Tasks from the EU to the Member States: A Bumpy Road To An Unclear Destination', (2015) *Common Market Law Review* 51-84.

⁶⁰ N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.'

⁶¹ G.De Búrca, 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor', (1998) 36(2) *Journal of Common Market Studies* pp. 217-35.

⁶² M.Kumm, (2006) 'Constitutionalising subsidiarity in Integrated Markets: the Case of Tobacco Regulation in the European Union' (12(4) *ELJ* 503-533.

⁶³ Kumm Op.Cit. 519

⁶⁴ Kumm Op.Cit. 519.

⁶⁵ Case C-376/98 *Germany v Parliament and Council (Tobacco Advertising case)*; Case C-84/94 *UK v Council* [1996] ECR I-5755.

EU law-making institutions is the minimum necessary to deal with the problem identified.⁶⁶

Finally, Kumm argues that a subsidiarity and proportionality review involves considering the extent of the effect of a Union measure on autonomy of the Member State and the practical effect on the legal systems of the Member States and that this should not be out of proportion to the result achieved by the Union measure.⁶⁷ This inevitably requires the CJEU to undertake a balancing test. But as Kumm points out, citing the example of the *Swedish Match* case⁶⁸, the CJEU has failed to undertake a balancing test.⁶⁹ As he writes, ‘even though Article 5 (3) specifically mentions the principle of proportionality in the context of the conferral of powers and the commitment to subsidiarity, the Court of Justice did not engage proportionality as part of the jurisdictional enquiry...it did not connect that analysis to the legitimate purpose of federal intervention.’⁷⁰

Nevertheless, despite the importance Kumm places on undertaking such analysis, Kumm does not consider how the CJEU should undertake such a balancing exercise or whether different policy areas require different considerations. Nor does he specify exactly what the criteria should be or what factors the CJEU should take into account when undertaking such a balancing exercise. This is a significant omission as ‘balancing represents a different kind of thinking. The focus is directly on the interests or factors themselves. Each interest seeks recognition of its own and poses a head to head comparison with competing interests’.⁷¹ This thesis therefore seeks to identify the sector specific criteria that the CJEU would need to weigh up when employing subsidiarity and proportionality as an aspect applied to competences when determining the residency rights of EU citizens. Chapter 5 therefore adopts a normative approach and explores how a subsidiarity and proportionality review could be anchored in EU law to address competence issues when the CJEU is striking a balance between fundamental principles of EU law and residency rights of EU citizens. Even where there is no change in case outcomes an explicit explanation of how

⁶⁶ Kumm Op.Cit. 521.

⁶⁷ Kumm Op.Cit at 522.

⁶⁸ *Case C-210/03, Swedish Match AB and Swedish Match UK Ltd. v. Secretary of State for Health.*

⁶⁹ Kumm Op.Cit 522.

⁷⁰ Kumm Op.Cit. at 523.

⁷¹ T.Aleinikoff, ‘Constitutional Law in the Age of Balancing’, [1987] 96 Yale Law Journal 943 at 945.

the CJEU had considered subsidiarity in the CJEU's reasoning would help to improve the quality of the reasoning of the CJEU and consequently enhance the legitimacy of the CJEU's ruling.⁷²

2. Competence, conferral and the principle of subsidiarity

The question of determining exactly how power between the EU and the Member States is divided is an important and current issue for Member States in the European Union.⁷³ For powers which have not been ceded to the EU remain with the Member States i.e. under the principle of conferral. Powers given to the EU by the Treaty and which give the EU power to act in a particular policy field and the power enjoyed by the EU in that area are known as competence.⁷⁴ EU competences can only arise through specific Treaty provision although as Craig points out, 'the reality is that EU competence has resulted from the symbiotic interaction of four variables: Member State choice as to the scope of EU competence, as expressed in Treaty revisions; Member State, and since the Single European Act 1986, European Parliament acceptance of legislation that has fleshed out the Treaty articles; the jurisprudence of the Community courts; and the decisions taken by the institutions as to how to interpret, deploy, and prioritize the power accorded to the EU.'⁷⁵ However, academic critique has pointed out how there has been a competence creep which has posed challenges to Member State competence in various shared competence policy areas.⁷⁶ This is especially relating to the internal market Article 114 TFEU and as illustrated by the CJEU in *Viking* where it stated, 'even if, in the areas which fall outside the scope of the Community's competence, the Member State are still free, in principle, to lay down the conditions governing the existence and exercise of the rights in

⁷² N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.'

⁷³ See further the recent Foreign and Commonwealth Review of the Balances of Competences between the UK and the EU, Cm 8415, (2012) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/35431/eu-balance-of-competences-review.pdf> accessed 29.1.14.

⁷⁴ See further W.Hofeld, *Fundamental Legal Conceptions as Applied in Judicial reasoning*. With an introduction by Nigel Simmonds, edited by D.Campbell and P.Thomas (Dartmouth, 2011) at 21 and who defines legal competence or power as 'a change in a given legal relation [which] may result from some superadded fact or group of facts not under the volitional control of a human being (or human beings); or from some superadded fact or group of facts which are under the volitional control of one or more human beings'.

⁷⁵ P.Craig, *The Lisbon Treaty, Law, Politics, and Treaty Reform*, (Oxford, OUP, 2010) 156.

⁷⁶ See S.Prechal, 'Competence Creep and general principles of law', (2010) 31 *Review of European Administrative law*, 5-11.

question, the fact remains that, when exercising competence, the Member States must nevertheless comply with Community law'.⁷⁷

On the other hand, the EU is bound by the principle of conferral which denotes a system where the EU institutions can exercise only competence attributed to it.⁷⁸ There are also different categories Union powers set out in the Article 2 TFEU and an extensive array of competences provided for in Articles 2-6 TFEU.

Firstly, there is exclusive competence in Article 2(1) TFEU which gives the EU exclusive power to legislate. This means that the EU alone is able to bring in legislation. Article 3 TFEU defines the scope of the European Union's sphere of exclusive competences explicitly in areas such as competition rules and provisions relating to the customs union. Such an explicit definition of the meaning of exclusive competence has brought about obvious advantages of clarity. So for example the House of Lords 10th Report records that 'The Lisbon Treaty makes a welcome attempt to set out with greater clarity the demarcations of responsibility between Member States and the EU.'⁷⁹ On the other hand, Craig is critical and points out how there 'may also be difficult borderline problems between provisions relating to the customs union, and other aspects of the internal market, since the customs union falls within exclusive competence, while the internal market is shared competence'.⁸⁰

Article 2 (2) TFEU provides for the second type of competence i.e. shared competence. This provides that 'the Member States shall exercise their competence to the extent that the Union has not exercised its competence'. As Barnard and Peers point out though, the 'use of the term shared is obviously not appropriate, in that it implies that the Member States remain competent to act in respect of matters which are already governed by Union legislation, whereas this

⁷⁷ See S.Prechal, 'Competence Creep and general principles of law', (2010) 31 Review of European Administrative law', 5-11 at 5 citing Case C-438/05 *Viking* [2007] ECR I-10779.

⁷⁸ Article 2 TFEU.

⁷⁹ House of Lords Constitution Committee, 6th Report of Session 2007–08, *European Union (Amendment) Bill and the Lisbon Treaty: Implications for the UK Constitution*, Report with Evidence, Ordered to be printed 19 March 2008 and published 28 March 2008 at para 134.

⁸⁰ P.Craig, *The Lisbon Treaty, Law, Politics, and Treaty Reform*, (Oxford, OUP, 2010) 161. See also chapter 18 of P.Craig and G. de Burca, *EU law Text, Cases and Materials* (Oxford University Press, 5th ed, 2011) ch 18 for examples of cases.

is not the case. While the term concurrent might have been more accurate, the choice of shared was almost certainly deliberate and politically motivated.’⁸¹

On the other hand, Schütze outlines that following the Treaty of Lisbon, these shared competences ‘remain the ordinary competences of the European Union. Unless the Treaties expressly provide otherwise, an EU competence will be shared.’⁸² Furthermore, Barnard and Peers point out that Member States may ‘exercise their competence to the extent the Union has not exercised its competence. Once the Union has adopted rules on a particular matter, the Member State action is said to be pre-empted and they may no longer legislate. Given the nature of Union competences, however, pre-emption may only cover those elements of the Union action in question and not the whole area of the activity being regulated’.⁸³ This is provided for in Article 2(2) TFEU states ‘When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence’. Protocol No.25 on the Exercise of Shared Competence also states that ‘With reference to Article 2 of the Treaty on the Functioning of the European Union on shared competence, when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area.’

There are many examples of shared competences⁸⁴ especially in the social policy context and in particular relating to the approximation of internal market rules which include Article 115 TFEU (ex Article 94 TEC), Article 114 TFEU (ex

⁸¹ K.Bradley, ‘Legislating in the European Union’, in C.Barnard and S.Peers, *EU law*, (OUP, 2014) at 108.

⁸² P.Craig, *The Lisbon Treaty, Law, Politics, and Treaty Reform*, (Oxford, OUP, 2010) at 5.

⁸³ P.Craig, *The Lisbon Treaty, Law, Politics, and Treaty Reform*, (Oxford, OUP, 2010) at 108.

⁸⁴ Article 4 TFEU lists these as ‘the internal market, social policy for the aspects defined in this Treaty, economic, social and territorial cohesion, agriculture and fisheries, excluding the conservation of marine biological resources, environment, consumer protection, transport, trans-European networks, energy, area of freedom, security and justice, common safety concerns in public health matters for the aspects defined in this Treaty’.

Article 95 TEC) and Article 352 TFEU (ex Article 308 TEC).⁸⁵ These Articles not only provided the generalised powers necessary for the attainment of the common market and the internal market, they have also been relied upon as competence for the enactment social policy legislation by the EU. So, for example, in 1974 Directive 75/117 on equal pay ⁸⁶ was adopted on the basis of Article 115 TFEU (ex Article 94 TEC) and Directive 79/7 on equal treatment in matters of social security⁸⁷ was adopted on the basis of Article 352 TFEU (ex Article 308 TEC). Another example of shared competence is Article 147 TFEU (Article 127 TEC)) which provides that ‘the Union shall contribute to a high level of employment by encouraging co-operation between Member States and by supporting and, if necessary, complementing their action. In doing so, the competence of the Member States shall be respected.’⁸⁸ Social policy, which is relevant in this thesis because of its link with EU citizenship, is much more contestable as a competence than the internal market, but flexible use of Article 114 TFEU and Article 352 TFEU potentially brings social policy matters within exclusive and shared competences.

The third type of competence listed in paragraph 3 of Article 2 TFEU is co-ordinating competence. Paragraph 3 of Article 2 TFEU provides that ‘The Member States shall coordinate their economic and employment policies within arrangements as determined by this Treaty, which the Union shall have competence to provide.’

The final category of competence is set out in Article 2 (5) TFEU. This article provides that ‘in certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas. Legally binding acts of the Union adopted on the basis of the provisions in the Treaties relating to these areas shall not entail harmonization of Member States’ laws or regulations’. Article 6 TEU specifies these areas as being industry, culture, tourism, education, vocational training,

⁸⁵ Now following the Treaty of Lisbon articles 114, 115 and 352 TFEU.

⁸⁶ OJ [1979] L44/19

⁸⁷ OJ [1979] L6/24

⁸⁸ See further S.Wetherill ‘Competence Creep and Competence Control (2004) 23 Yearbook of European Law 1-55 for discussion on how institutions tend in practice to move beyond their explicit competence.

youth and sport, civil protection and administrative co-operation. This latter competence Schütze terms complementary competence.⁸⁹ These latter competencies are categories where the EU has a much weaker competence. Furthermore the treaty does not use this term in Article 2 (5) TFEU, so it is a non-legislative competence according to Schütze.⁹⁰ Arguably, however, the CJEU could draw upon subsidiarity to recognise complementary competences in a particular part of a policy area especially where a policy area already includes shared competences.

There also seems to be an overlap between the three categories to some extent but especially between shared and complementary competences where the EU is acting on the edge of shared competences such as when considering residency rights of EU citizens who are non-economically active, considered further in chapters 4 and 5 of this thesis. Furthermore, as Craig points out, the Lisbon Treaty has not clarified competences completely. Here arguably subsidiarity, which is a key legal principle⁹¹ in EU law governing the exercise of EU law-making in shared competence areas,⁹² pushes towards recognising shared and complementary competences when in doubt. For subsidiarity encompasses the principle that the EU institutions demonstrate that not only is there a need for legislative action at supranational level but that there are distinct advantages of

⁸⁹ S.Wetherill 'Competence Creep and Competence Control (2004) 23 Yearbook of European Law 1-55.

⁹⁰ R.Schütze, 'Lisbon and the Federal Order of Competences: a Prospective Analysis', (2008) European Law Review, 709-722.

⁹¹ Although principles are frequently associated with publicised abstract ideas or values of import, defining legal principles and how these differ to legal rules in jurisprudential theory has been the subject of considerable academic debate. For further discussion on the difference between legal rules and principles see R.Dworkin, 'The Model of Rules I', in: *idem, Taking Rights Seriously* (Harvard University Press Cambridge 1987) 14 at 25-26. For discussion of the wider context of the competing jurisprudential debates regarding the relationship of law to morality that this view takes place within see Dworkin's attack in his book *Law's Empire*, (1986, Harvard University Press) on the jurisprudential theorist Hart's view that law and morality are not necessarily connected. In respect of further discussion of Hart's view that law and morality are not necessarily connected see H.L.A Hart, *The Concept of Law*, (1994, Oxford, Clarendon Press) at 185-86. In particular, Hart writes 'the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy demands of morality, though in fact they have often done so', and at 268 that 'though there are many different contingent connections between law and morality there are no necessary conceptual connections between the content of law and morality'. This latter approach has been termed a positivistic theory. See further discussion in chapter 2.

⁹² Article 5 TEU. See also the Protocol on the application of the principles of subsidiarity and proportionality, Consolidated Texts of the EU Treaties as amended by the Lisbon Treaty, pages 204 to 207 (Cm 7310) and House of Commons European Scrutiny Committee 'Subsidiarity, National Parliaments and the Lisbon Treaty' Thirty-third Report of Session 2007-08 <<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/563/563.pdf>> last accessed 12.7.12. for discussion of this Protocol. See also chapters 2 and 3 for further discussion of this principle with reference to relevant academic debate in EU law.

legislative action at supranational level over and above Member State legislative action or inaction at a national level.

On the other hand, as the EU is not a state but rather an association of 28 Member States where the EU is competent to act in the first two categories it is therefore in need of new governing principles which help to ensure the democratic legitimacy of the EU when exercising competence. The first of these new principles, established at Maastricht, is the principle of conferral in article 5(2) TEU which provides that the ‘Union can only act within the limits conferred upon it by the Member States in the Treaties in order to attain the objectives set out therein.

This is related to the importance of adherence to the rule of law as provided for in the Preamble, Article 2 of the TEU and Article 21 of the TEU and Article 263 of the TFEU. The rule of law is not defined in these provisions. Furthermore, more widely, although the rule of law has been argued to be an essentially contested concept,⁹³ there are certain accepted tenets of the rule of law, as noted above where Fallon focuses on its procedural character. Consistently with this, Waldron, for example, argues that the key tenet of the rule of law is that of formal legality.⁹⁴ Tamanaha too has emphasised the importance of formal legality as well as pointing out, relatedly, that there is a link between democracy and the rule of law in that there is a requirement for judges to follow the law in order to give effect to the will of the law-making institutions.⁹⁵ As Conway explains, ‘this notion of following the law entails predictability in the law. Predictability entails relatively clear, shared criteria of interpretation. On this conception, the law-maker can be relatively certain how the judiciary will interpret the law and how the law will take practical effect. Without predictability, the significance of the publication of laws and of the prohibition on retroactivity breaks down...’⁹⁶ Thus, predictability is an important consequence of an adherence to the rule of law and consistent with a widely acknowledged key tenet of democracy namely

⁹³ See G.Conway, *The Limits of Legal Reasoning and the European Court of Justice*, (CUP, 2012) at 90 and W.B.Gallie, ‘Essentially Contested Concepts’, (1956) 56 Proceedings of the Aristotelian Society, 167-198.

⁹⁴ J.Waldron, ‘Is the Rule of Law an Essentially Contested Concept (in Florida)’, (2002) 21(2) Law and Philosophy, 137-164, 148-149.

⁹⁵ B.Tamanaha, *On the Rule of Law: History, Politics, Theory*, (Cambridge University Press, 2004) at 119.

⁹⁶ See G.Conway, *The Limits of Legal Reasoning and the European Court of Justice*, (CUP, 2012) at 93.

representation by a parliamentary system.⁹⁷ This context is with competence, because political representation is about the exercise of power over citizens.

It is also important to emphasise how the rule of law is a widely recognised aspirational principle as evidenced in both the European Convention of Human Rights⁹⁸ and the preamble to the Statute of the Council of Europe.⁹⁹ All the Member States are signatories to these Treaties and thus bound by these Treaties.¹⁰⁰ Furthermore, although the rule of law was not expressly referred to in the original Treaty of Rome, currently the Treaty of Lisbon includes various references to the rule of law and democracy. These references are to be located right from the outset of the Treaty alongside democracy, thus evidencing its importance and its link with democracy. For example, in the Preamble to the TEU which provides that ‘drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law’. In the main body of the Treaty itself in Article 2 that ‘the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights....’ There are also other references located in Article 21 of the TEU and Article 263 of the TFEU, the latter specifically relating to the CJEU providing that,

‘the Court of Justice of the EU shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers’.

The Charter of Fundamental Rights of the EU also includes in its preamble that ‘the Union is based on the principles of democracy and the rule of law’. What rights of EU citizens are sacrosanct in light of the Charter of Fundamental Rights

⁹⁷ G.Conway, *The Limits of Legal Reasoning and the European Court of Justice*, (CUP, 2012) at 92. For a general discussion of the contested nature of democracy see D.Collier, F.D. Hidalgo, and A.Maciuceanu ‘Essentially contested concepts: Debates and applications’, (2006) 11 (3), *Journal of Political Ideologies* 211-246 at 222-224.

⁹⁸ European Treaty Series No 5.

⁹⁹ European Treaty Series No 1.

¹⁰⁰ See *Ilia and Appeal Court in Athens*, [2015] England and Wales High Court (Admin) para 50 where Lord Justice Aikens ruled that there ‘is a strong, albeit rebuttable presumption that EU Member States will abide by their Convention obligations’.

when dealing with cases involving the residency rights of EU citizens is therefore an important question. This is particularly so in light of the impending accession of the EU to the ECHR and which Betten and Grief have argued ‘would be consistent with the development of a legal order which is no longer directed at economic operators but at citizens of the Union’.¹⁰¹ It also feeds into wider discussions about the judicial approach to fundamental rights post Lisbon¹⁰² and how respect for human rights fits into a subsidiarity analysis and whether the CJEU may apply a human rights review in a way that oversteps its normal competence.

The second new principle established at Maastricht is the principle of subsidiarity.¹⁰³ This is a key legal principle in EU law governing the exercise of EU law-making in shared competence areas.¹⁰⁴ It can be connected with the rule of law and conferral, as well as democracy. Such a principle Schütze argues is a constitutional device which has been pivotal in the EU’s construction of a philosophy of co-federalism, the latter encompassing the idea that two governmental bodies work together in a shared legal sphere.¹⁰⁵ It finds legal

¹⁰¹ L.Betten and N.Grief, *EU law and Human Rights*, (European Law Series, Longman, 1998) at 119 referring to a point made by the European Parliament in its observations to the CJEU in Opinion 2/94, Report for the Hearing.

¹⁰² See S. Morano-Foadi and S.Andreadakis, ‘Reflections on the Architecture of the EU after the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights’, (2011) pp 595-610 at 595 and who argues that the post-Lisbon era is characterized by firstly the impact of the Charter of Fundamental Rights following Article 6(1) of the TEU and secondly the future accession to the ECHR of the EU pursuant to Article 6(2) TEU.

¹⁰³ See literature by G.A. Berman, ‘Taking Subsidiarity Seriously: Federalism in the European Community and the United States’, (1994) 94(2) Columbia Law Review 331 at 339 of how subsidiarity, as a mediating concept guiding competences in multi-level governance, has also been utilised in a variety of different theoretical federal, political and economic contexts. See also Chapter 2 of this thesis which focuses on exploring subsidiarity and proportionality as twin constitutional principles in EU law making in shared areas of competence.

¹⁰⁴ Article 5 TEU. See also the Protocol on the application of the principles of subsidiarity and proportionality, Consolidated Texts of the EU Treaties as amended by the Lisbon Treaty, pages 204 to 207 (Cm 7310) and House of Commons European Scrutiny Committee ‘Subsidiarity, National Parliaments and the

Lisbon Treaty’ Thirty-third Report of Session 2007–08 <<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/563/563.pdf>> last accessed 12.7.12. for discussion of this Protocol. See also chapters 2 and 3 for further discussion of this principle with reference to relevant academic debate in EU law.

¹⁰⁵ See further R.Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law*, (2009, OUP) at 284 for a consideration of the federal philosophy that informs the EU’s legal structure and in particular an argument of how the EU legal system has evolved from dual federalism (which encompasses the philosophical idea of dual sovereignty where both governmental bodies are co-equals) to co-operative federalism (which encompasses the philosophical idea that two governmental bodies work together in a shared legal sphere).

expression¹⁰⁶ in Article 5(3) TEU, the latter containing the principle that the EU institutions need to demonstrate that not only is there a need for legislative action at supranational level but that there are distinct advantages of legislative action at supranational level over and above Member State legislative action or inaction at a national level. Its placing in the Treaty in this way indicates its status as a general constitutional principle.

On the other hand, although subsidiarity is a key constitutional principle of EU law, it was not originally included in the Treaty of Rome¹⁰⁷. However, increasing political cooperation beyond a common market gathering pace during the 1980's challenged more directly the concept of political sovereignty of Member States.¹⁰⁸ This had been happening subtly through the case law of the CJEU,¹⁰⁹ but the issue became more explicit following the Single European Act¹¹⁰, where subsidiarity was included as a legal principle in respect of the environment. Article 130r (4) of the EEC Treaty (inserted by the SEA) read as follows:

‘The Community shall take action relating to the environment to the extent to which the objectives referred to in paragraph 1(i) to preserve, protect and improve the quality of the environment; (ii) to contribute towards protecting human health; (iii) to ensure a prudent and rational utilization of natural resources can be attained better at Community level than at the level of the individual Member States. Without prejudice to certain measures of a Community nature, the Member States shall finance and implement the other measures’.

Thus, the thrust of this particular subsidiarity test was directed more towards ensuring that where the EU is best placed to act it should act. In 1991 Jacques

¹⁰⁶ It is widely acknowledged that legal systems are composed of rules and principles and that in adjudication judges apply rules by subsumption and apply principles by balancing. See in particular R.Alexy, *A Theory of Constitutional Rights*, translated by J.Rivers, (Oxford, 2002) 44. In respect of the latter means of adjudication, Alexy argues at 50 in favour of balancing principles in adjudication on the grounds that principles are ‘optimising commands’ and therefore ‘are essentially determined by competing principles, implying that principles can and must be balanced against one another’. This is discussed further in chapter 2 of this thesis.

¹⁰⁷ Treaty Establishing the European Economic Community, Mar. 25, 1957, art. [], 298 U.N.T.S. 11, at [] [hereinafter EEC Treaty].

¹⁰⁸ G.De Búrca and P.Craig, *EU Law: Text, Cases and Materials*, (5th ed., OUP, 2011) at chapter 1 for a history and development of the common market.

¹⁰⁹ See for egs Case 120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung fur Branntwein* [1979] ECR 649 at para 5.

¹¹⁰ Single European Act, 1987 O.J. L 169/1, [hereinafter SEA] (amending Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty]).

Delors also proposed using subsidiarity, although he proposed using subsidiarity as a useful mediating concept for balancing, on the one hand, the EU's quest for ever increasing European legal integration following the Treaty of Rome¹¹¹ and, on the other, a respect for the cultural diversity of the individual legal systems of the 28 Member States.¹¹²

However, it was not until the Treaty of Maastricht in 1992 that subsidiarity was officially introduced into the Treaties as a formal legal and constitutional principle generally in EU law. Here, subsidiarity was to be used to guide the determination of the level at which legislative action should take place in policy areas where the EU and the Member States share competence by requiring the Union institutions to state clearly why there is a need for Union legislative action.¹¹³

Most recently, it has been confirmed as a constitutional principle in Article 5(3) Treaty Establishing the European Union (TEU). This provision includes that,

‘Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.’

Thus the latter article continues to emphasise that the EU law and policy making institutions should only act in areas of shared competence where the objectives of any proposed EU policy action cannot sufficiently be achieved by the Member States and that the EU law-making institutions should justify

¹¹¹ For the purposes of this thesis, the definition of European legal integration offered is namely ‘the gradual penetration of EU law into the domestic law of its Member States’, A.M.Burley and W.Mattli, ‘Europe before the Court: A Political Theory of Legal Integration’, (1993) 47(1) *International Organisation* 41-76 at 43. See also P.Craig and G. de Búrca, *EU law Text, Cases and Materials*, (5th. Ed., Oxford, OUP, 2011) at chapter 1 for a discussion of the evolution of European integration and the theories put forward to explain this evolution as a series of distinct phases. For account of the rival theories of European legal integration and a discussion of their differing ontological scope i.e. how they differ in what they mean by integration see, for egs, A.Wiener and T.Diez, (eds) *European Integration Theory*, (2nd ed., OUP, 2012).

¹¹² See J.Delors et al, *Subsidiarity: the Challenge of Change*: (Maastricht, European Institute of Public Administration, 1991). The use of subsidiarity to guide EU law-making will be discussed further in chapter 6 of this thesis.

¹¹³ Article 5 TEU.

what the benefits are from Union intervention as opposed to each individual Member State bringing in legislation or policy or alternatively failing to bring in legislation or perhaps, looser intergovernmental cooperation at the Council of Europe level where the ERTA¹¹⁴ doctrine does not rule this out.¹¹⁵ In addition, there is a criterion for applying subsidiarity set out in Article 5 of Protocol No 2 on the applications of the principles of subsidiarity and proportionality annexed to the Treaties which requires the EU to provide justification for the use of subsidiarity as a mechanism to guide the exercise of competence by the EU.¹¹⁶ It further requires the Commission¹¹⁷ to send with all draft legislative acts an explanation of how the proposal complies with subsidiarity not just to the Union institutions for scrutiny but also to the national Parliaments.¹¹⁸ This will be considered further in chapter 2.

A further important and related innovation is that the Lisbon Treaty strengthens the idea of protecting local identities. For the Lisbon Treaty has enhanced the old Article 6(3) TEC by including a revised Article 4(2) TEU which requires the Union to respect not only the national identity of Member States but also the political, constitutional and legal regimes of those Member States. The placing of this provision between the principle of conferral and the principle of sincere co-operation at the outset of the TEU emphasises the central importance of such a principle in EU law in trying to balance the supranational concern with integration with the continuing competences and sovereignty of the Member States. It points against a one-sided automatic preference for integration and further indicates the

¹¹⁴ Case 22/50 *Commission v Council (Re European Road Transport Agreement) (ERTA)* 1971 ECR 263.

¹¹⁵ R. Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law*, (2009, OUP) 316-317.

¹¹⁶ See also the Protocol on the application of the principles of subsidiarity and proportionality, Consolidated Texts of the EU Treaties as amended by the Lisbon Treaty, pages 204 to 207 (Cm 7310) and House of Commons European Scrutiny Committee 'Subsidiarity, National Parliaments and the Lisbon Treaty' Thirty-third Report of Session 2007-08 <<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/563/563.pdf>> last accessed 12.7.12. for discussion of this Protocol..

¹¹⁷ For further discussion of assessing the impact of Commission proposals see EC Impact Assessment Guidelines (2009) <http://ec.europa.eu/smart-regulation/impact/commission_guidelines/docs/iag_2009_en.pdf> last accessed 01.08.15.

¹¹⁸ Protocol on the application of the principles of subsidiarity and proportionality, Consolidated Texts of the EU Treaties as amended by the Lisbon Treaty, pages 204 to 207 (Cm 7310) article 5(3).

importance of justifying the usefulness of the exercise of EU competence. Utilising subsidiarity is an important practical way to apply Article 4(2) TEU.

The existence of the national identity clause¹¹⁹ and its respect for Member States legal regimes and the Preamble and Article 1 of the revised TEU also further emphasise that decisions regarding EU law-making are taken as closely as possible to the citizens of Europe. One of the arguments of the thesis is that there is considerable potential for the CJEU to make greater use of these provisions to inform and support its reasoning when determining the residence rights of EU citizens. This is particularly so when undertaking a subsidiarity review where proportionality is treated as an aspect of subsidiarity applied to competences.¹²⁰ This will be considered further in chapter 2 of this thesis. This is especially relevant in light of criticism of the CJEU as an activist court¹²¹ and, more generally, the importance of the CJEU sufficiently justifying to its audience that in their decisions they are applying valid law given the enactment of the principles at Treaty level.¹²² Relatedly, it is also important bearing in mind on the one hand the wider and related concerns on the part of the Member States of loss of competence and, on the other, the need of all law-making EU institutions (the Council of Ministers, the European Parliament, and the European Commission) to claim democratic legitimacy¹²³ when legislating in areas of shared competence. Subsidiarity, and the related idea of proportionality, are therefore central to the character of the EU as a legal and political entity mediating the continued

¹¹⁹ See further K. Nicolaidis, 'We the Peoples of Europe', (2004) 83 Foreign Affairs 97-110 at 102 and who writes, 'today's constitution does not call for a homogenous community or for laws grounded on the will of a single European demos. Rather it makes mutual respect for national identities one of its foremost principles'.

¹²⁰ M.Kumm, (2006) 'Constitutionalising subsidiarity in Integrated Markets: the Case of Tobacco Regulation in the European Union' (12(4) ELJ 503-533 at 531.

¹²¹ See for example P.Neill, *The European Court of Justice: A Case Study in Judicial Activism*, (London: European Policy Forum, 1995) at 2; T.Hartley, 'The European Court, Judicial Objectivity and the Constitution of the European Union', (1996) 11 (2) Law Quarterly Review 411-423; R.Herzog and L.Gerken: 'Stop the European Court of Justice', EU Observer.com, (2008) <<http://euobserver.com/9/26714>> last accessed 20.6.12.

¹²² J.Bengoetxea, *The Legal Reasoning of the European Court of Justice*, (OUP, 1993) 114. For a more general discussion on the importance of courts justifying their decisions through their judicial reasoning see R.Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (trans by R.Adler and N.MacCormack), (Clarendon Press, 1989) 221; N. MacCormick 'Argumentation and Interpretation in Law', (1993) 6(1) Ratio Juris 16-29.

¹²³ For further discussion see for example J. Bohman, 'Institutional reform and democratic legitimacy: deliberative democracy and transnational constitutionalism', *Revue européenne des sciences sociales* [En ligne], XLV-136 | 2007, < <http://ress.revues.org/90> ; DOI : 10.4000/ress.90> accessed 3.12.13.

existence of distinct Member States with a sometimes competing supranational authority.

Thirdly is the principle of proportionality, considered further in chapter 2. This concerns the intensity of any EU legislative action. In EU law, proportionality is defined in Article 5 TEU. It requires that when the EU is bringing in legislation in areas of shared competence that ‘the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties’. The criteria for applying proportionality are set out in Article 5 of Protocol No 2 on the applications of the principles of subsidiarity and proportionality annexed to the Treaties.

‘The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators. Draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved’.

Thus all three principles – conferral, subsidiarity, proportionality - succeed each other: conferral is about whether the EU can exercise power, subsidiarity is about whether it should be exercised and proportionality is about how much it should be exercised. Furthermore, as Kumm argues, all these principles have a central constitutional role in the protection of federalism values in the EU.¹²⁴ This will be considered further in chapter 2. In particular, it will be pointed out that the use of proportionality by the CJEU also needs to be accompanied by a clear, consistent and principled approach to its content and structure in order to provide a clear doctrinal test that the CJEU can utilise in its case law. This relates to the rule of law, principles of certainty and predictability.¹²⁵ For as Rasmussen argues, where there is judicial activism displayed by the CJEU, this ‘may severely hamper and strain the Community/State relationship of co-operative enforcement of the Community’s laws and judgements. Even though widespread opposition to a

¹²⁴ M.Kumm, (2006) ‘Constitutionalising subsidiarity in Integrated Markets: the Case of Tobacco Regulation in the European Union’ (12(4) ELJ 503-533 at 531.

¹²⁵ B.Tamanaha, *On the Rule of Law: History, Politics, Theory*, (Cambridge: Cambridge University Press, 2004)

deep and wide ranging judicial involvement in the conduct of the political affairs of government might never see the light of day, it may cause a sneaking erosion of judicial authority and legitimacy'.¹²⁶ Such an erosion, he argues, inevitably leads to a 'predictable loss of judicial authority and legitimacy'¹²⁷ and 'is dangerous to a cohesive and effective promotion of the vision of the Founding Fathers, since this has been dependent on the cumulative efforts of all branches of Community government.'¹²⁸

3. Scope of thesis

The purpose of this thesis is not to consider literature on the philosophical foundations of the EU¹²⁹ and, in particular, the question of how autonomous should the EU be from that of the Member States.¹³⁰ Nor is the purpose of this thesis to consider jurisprudential literature which seeks to theorise the differing constitutional conceptions of the EU¹³¹ or to consider the extent to which concepts such as democracy¹³² and justice¹³³ should be applicable to the EU law-making institutions within this new EU legal order.¹³⁴ This thesis takes as its base the

¹²⁶ Rasmussen, *On Law and Policy* (Martinus Nijhoff Publishers, Dordrecht, 1986) at 8.

¹²⁷ Ibid at 9.

¹²⁸ Ibid at 8.

¹²⁹ For a recent discussion of see for example J.Dickson and P.Eleftheriadis, *The Philosophical Foundations of the EU*, (OUP, 2012). See also A.Williams, *The Ethos of Europe, Values, Law and justice in the EU*, (CUP, 2010) for a discussion in chapter 1 of how there has been philosophical uncertainty about the 'soul of Europe' since its beginning and at 5 the 'need for an identity of and for the Union'.

¹³⁰ See also R. Barents, *The Autonomy of Community law*, (The Hague, Kluwer Law International 2004); N.Walker, 'The idea of Constitutional Pluralism, (2002) 65 Modern Law Review 317-59; J.Weiler, *The Constitution of Europe: Do the new clothes have an Emperor and other essays on European Integration*, (Cambridge University press, 1999) 238-263.

¹³¹ See for example J.Weiler, 'The transformation of Europe' (1991) 100 Yale Law Journal 2403; P.Craig, 'Constitutions, Constitutionalism, and the European Union, (2001) 7(2) 125-150; and more recently K.Jaklic, *Constitutional Pluralism in the EU*, (Oxford: OUP, 2014) which includes a critical summary of the existing academic debates into a new line of academic enquiry into the conceptual nature of the EU's constitutional authority.

¹³² For further discussion see for example L.Siedentop, *Democracy in Europe*, (London: Penguin 2000) and A.Williams, *The Ethos of Europe, Values, Law and justice in the EU*, (CUP, 2010) pp 165-196.

¹³³ A.Williams, *The Ethos of Europe, Values, Law and justice in the EU*, (CUP, 2010) and who writes at 549-77 at 552, 'a satisfactory theory of justice needs to be constructed and adopted constitutionally if EU law is to be perceived as the guardian of an ideal constitution which possess a coherent ethical vision for the EU'. See also more generally J.Rawls, *A Theory of Justice*, (Cambridge, Mass: Harvard University Press, 1971) and his arguments relating to the idea of a natural duty of justice being essential to support political institutions at 3 and 7 where he writes that 'justice is the first virtue of social institutions' and 'For us the primary subject of justice is the basic structure of society or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation'.

¹³⁴ Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585.

existence of the EU and of shared competences as expressed in the Treaties and that democracy and the rule of law are accepted values.

It is also beyond the scope of this thesis to consider in depth the wealth of literature on the theoretical debates on the European integration process and the role of the CJEU in that process.¹³⁵ Instead the intention of this thesis rests on an assumption. If the EU and the Member States have adopted subsidiarity in the Treaties as a guide to EU law-making in shared policy areas, then the EU institutions should pay attention to subsidiarity when law-making.

More generally, the question of the role of subsidiarity as a restraint on the Union legislature in shared policy areas has been the subject of various academic discussion and will be discussed further in chapter 2 of this thesis.¹³⁶ In addition, as a key institution involved with law-making is that of the CJEU, it has also been argued that the CJEU as an EU institution ‘should seek a way of addressing the complex concerns which underpin the subsidiarity principle when it chooses a particular policy direction in interpreting an open-ended Treaty provision’.¹³⁷ With this latter argument in mind this thesis includes a critical review both descriptive and normative of the extent of the judicial use of subsidiarity when reviewing EU institutional action. The argument in the thesis, therefore, applies across the institutional activity of the EU in the exercise of shared competence

¹³⁵ For a general discussion of both the theoretical and the legal dimension of European legal integration, see K.A.Armstrong, ‘Legal Integration: Theorizing the Legal Dimension of European Integration’, (1998) 36(2) *Journal of Common Market Studies*, 155-174. For account of the key theories of European legal integration and a discussion of their ontological scope i.e. what they mean by integration see A.Wiener and T.Diez, (eds) *European Integration Theory*, (2nd ed., OUP, 2012). See also G. De Burca, D.Kochenov, and A.Williams, ‘Debating Europe’s Justice Deficit: the EU, Swabian Housewives, Rawls and Ryanair’ EU1 working Paper LAW 2013/11, 2013 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2354568> 1.3.14 for a paper which argues that there is an important gap in the theorising of European integration namely ‘the essence of Justice, informing the integration project in Europe’. For a discussion of the role of the CJEU and European legal integration see for example J.Bengoetxea, N. MacCormick, and L.Moral Soriano, ‘Integration and Integrity in the Legal Reasoning of the European Court of Justice’ in G.de Búrca, and J.H.H.Weiler, (eds) *The European Court of Justice* (Oxford: Oxford University Press, 2001), pp. 43- 86; M.Cappelletti, M.Secombe, J.H.H.Weiler, *Integration through Law: European and the American Federal Experience: Vol 1: Methods, Tools and Institutions* (Berlin/New York: Walter de Gruyter, 1985) 86.

¹³⁶ G.Davies, ‘Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time’, (2006), 43(1) *Common Market Law Review*, pp 63-84; M. Kumm, ‘Constitutionalising Subsidiarity in Integrated Markets: the Case of Tobacco Regulation in the European Union’, (2006), 12(4) *European Law Review*, 503-33; R.Schütze, ‘Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism?’, (2009), 68(3) *Cambridge Law Journal* pp. 525-36.

¹³⁷ G.De Búrca, ‘The Principle of Subsidiarity and the Court of Justice as an Institutional Actor’, (1998) 36(2) *Journal of Common Market Studies* pp. 217-35 at 217.

and especially concerning the Court of Justice, which ultimately reviews the application of subsidiarity.

On the other hand, the CJEU has frequently not paid attention to subsidiarity and respect for localism in its interpretation of shared policy areas. This thesis therefore divides selected case law in this context into two distinct categories. Firstly cases where the CJEU engages in judicial review of the actions of the political institutions when law-making in chapter 3. Secondly, other cases in chapter 5 which involve the CJEU interpreting EU law in shared policy areas where there are other competing EU principles at issue. Here it will be argued that there is a compelling argument for judicial reasoning to engage more fully with how the CJEU should deal with such dissonance and operationalise subsidiarity to help ensure the proper respect for the division of power between the EU and the Member States in areas of shared competence. As this thesis will argue, there often significant cultural diversity in law making regimes throughout the 28 Member States and therefore, arguably, a strong case for deploying a mediating concept such as subsidiarity to guide the CJEU when determining the residency rights of EU citizens.

The thesis argues that subsidiarity could be anchored in EU law by the CJEU to help ensure the proper respect for local law-making in cases when determining the residence rights of EU citizens and determine what can be agreed upon at European level. This is an important issue as even if in the past the CJEU has tended to approach interpretation from a pro-union perspective, the adoption of a subsidiarity and proportionality review would help to to improve the quality of the reasoning of the CJEU and consequently enhance the legitimacy of the CJEU's ruling.¹³⁸ Such a question is especially important following the Treaty of Lisbon as there is now a greater clarity concerning the division of competence. The relevant provision which evidences this renewed interest is Article 5 TEU (ex Article 5 TEC) with Article 5 (3) TEU providing that subsidiarity is only relevant where the EU shares competence with the Member States in respect of law-making. Article 5 (3) TEU, in conjunction with the Protocol on subsidiarity and proportionality,¹³⁹

¹³⁸ N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.'

¹³⁹ See also the Protocol on the application of the principles of subsidiarity and proportionality, Consolidated Texts of the EU Treaties as amended by the Lisbon Treaty, pages 204 to 207 (Cm

then sets out a test that the EU institutions should follow, that that if the Member States cannot exercise competence efficiently enough then the EU should take action.

Furthermore, and for the first time and as part of the response to calls from the national Parliaments for more democratic legitimacy,¹⁴⁰ the Protocol also requires the EU to provide justification for the use of subsidiarity as a mechanism to guide the exercise of competence by the EU.¹⁴¹ It requires the Commission to send with all draft legislative acts an explanation of how the proposal complies with subsidiarity not just to the Union institutions for scrutiny but also to the national Parliaments.¹⁴² So, for example in Article 2 of the Protocol the Commission is required to undertake a consultation prior to proposing any legislation and in Article 5 to provide detailed written evidence as to how they have complied with the subsidiarity test including ‘some assessment of the proposal's financial impact and, in the case of a Directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation’ as well as ‘the reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators.’ The subsidiarity monitoring undertaken by national Parliaments is promoted as ‘help[ing] the EU reconnect with the citizen and to improve the democratic legitimacy of EU legislation’,¹⁴³ even though as Cygan has pointed out ‘the representative function of national Parliaments is towards its own government

7310) and House of Commons European Scrutiny Committee ‘Subsidiarity, National Parliaments and the Lisbon Treaty’ Thirty-third Report of Session 2007–08 <<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/563/563.pdf>> last accessed 12.7.12. for discussion of this Protocol.

¹⁴⁰ J.Mayoral, ‘Democratic improvements in the EU under the Lisbon Treaty, (2011) <<http://www.eui.eu/Projects/EUDO-Institutions/Documents/EUDOREport922011.pdf>> accessed 20.7.12. Craig Op.Cit. at 45-48 and 72 for a discussion of how the Lisbon Treaty has improved EU democracy

¹⁴¹ See also the Protocol on the application of the principles of subsidiarity and proportionality, Consolidated Texts of the EU Treaties as amended by the Lisbon Treaty, pages 204 to 207 (Cm 7310) and House of Commons European Scrutiny Committee ‘Subsidiarity, National Parliaments and the Lisbon Treaty’ Thirty-third Report of Session 2007–08 <<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/563/563.pdf>> last accessed 12.7.12. for discussion of this Protocol.

¹⁴² Protocol on the application of the principles of subsidiarity and proportionality, Consolidated Texts of the EU Treaties as amended by the Lisbon Treaty, pages 204 to 207 (Cm 7310) article 5(3) at article 5(3).

¹⁴³ A.Cygan, ‘National Parliaments within the EU polity – no longer losers but hardly victorious’, (2012) ERA Forum 517-533 at 525.

and not the Council. National Parliaments do not exist to legitimise EU legislation and the procedural requirements of subsidiarity monitoring do not alter this'.¹⁴⁴ Furthermore, both the EU institutions and the national Parliaments are also able to submit a reasoned opinion if they have concerns that the proposal does not comply with subsidiarity.¹⁴⁵ Such reasoned opinions, Dougan argues, provide 'the potential for the CJEU to scrutinize the EU's legislative process for compatibility of EU legislation with subsidiarity'. Such an innovation creates a new and potentially dynamic role for national Parliaments in the subsidiarity assessment in that national Parliaments will now be able to challenge proposed EU action in shared competence areas on the grounds of breach of subsidiarity. As Dougan explains, 'with such a wealth of material, argumentation over subsidiarity could metamorphose from the politically subjective into the readily justiciable.'¹⁴⁶

Furthermore, there is also a renewed emphasis on the use of subsidiarity with its inherent respect for local law-making to guide the EU law-making institutions when legislating in areas of shared competence¹⁴⁷ in conjunction with the national identity clause. Alongside the principle of proportionality, it is a corollary of the principle of conferral.¹⁴⁸ This latter principle is set out in Article 5 (2) TEU and provides that the EU can only exercise competence attributed to it. Such a principle Craig argues 'captured not only the idea that the EU should act within the limits of the powers attributed to it, but also carried the more positive connotation that the EU should be accorded the powers necessary to fulfil the tasks assigned to it by the enabling Treaties'.¹⁴⁹

¹⁴⁴ A.Cygan, 'National Parliaments within the EU polity – no longer losers but hardly victorious', (2012) ERA Forum 517-533 at 525.

¹⁴⁵ Protocol on the application of the principles of subsidiarity and proportionality, Consolidated Texts of the EU Treaties as amended by the Lisbon Treaty, pages 204 to 207 (Cm 7310) article 5(3) at articles 6 and 7. For a discussion see M.Dougan, 'The Treaty of Lisbon 2007: Winning minds, not hearts', (2008) Common Market Law Review 45 617-701 at 659

¹⁴⁶ M.Dougan, 'The Treaty of Lisbon 2007: Winning minds, not hearts', (2008) Common Market Law Review 45 617-701 at 661. See more generally R. Schütze, 'Lisbon and the Federal Order of Competences: A Prospective Analysis'. *European Law Review* 33(5): 709-722.

¹⁴⁷ This issue was the subject of a conference presentation by the author of this thesis entitled, 'Subsidiarity, an inherent respect for localism and the Court of Justice of the European Union', at the Society of Legal Scholars Conference 26-28 March 2013 at York Law School, York University.

¹⁴⁸ The recent Treaty of Lisbon has now focused attention on subsidiarity and proportionality through the Protocol on Subsidiarity and Proportionality.

¹⁴⁹ P.Craig, *The Lisbon Treaty, Law, Politics and Treaty Reform*, (OUP, 2010) 156-159 158.

With this in mind, this thesis adopts a doctrinal perspective and agrees with and develops firstly the argument by De Búrca that as the CJEU is a law-making institution it should employ subsidiarity to guide its reasoning when interpreting areas of shared competence. This means accepting a meta-teleological view of the CJEU's interpretative role in areas of shared competence.¹⁵⁰ For as Maduro explains,

‘teleological interpretation in EU law does not, [therefore] refer exclusively to a purpose driven interpretation of the relevant legal rules. It refers to a particular systemic understanding of the EU legal order that permeates the interpretation of all its rules. In other words, the Court was not simply been concerned with ascertaining the aim of a particular legal provision. It also interpreted that rule in the light of the broader context provided by the EC (now EU) legal order and its constitutional telos. There is a clear association between the systemic (context) and teleological elements of interpretation in the Court are reasoning. It is not simply the telos of the rules to be interpreted that matters but also the telos of the legal context in which those rules exist. We can talk therefore of both a teleological and a meta-teleological reasoning in the Court’.¹⁵¹

In respect of the frequent use by the CJEU of a teleological approach, a few commentators have argued that ‘teleological interpretation can also be seen as more faithful to the democratic outcomes since it prevents textual manipulation of the legal rules.’¹⁵² However, this is a debateable point of view and against the weight of analysis in the literature where a more general charge is that teleological interpretation is more open to manipulation because of the issue of varying levels of generality.¹⁵³

The frequent use by the CJEU of a teleological approach has led a few commentators to argue that ‘teleological interpretation can also be seen as more faithful to the democratic outcomes since it prevents textual manipulation of the

¹⁵⁰ The interpretative approach of the CJEU will be discussed further in chapter 3 section 2.2.

¹⁵¹ M.Maduro ‘Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism’ 1 (2) European Journal of Legal Studies <<http://www.ejls.eu/2/25UK.pdf>> last accessed 3.1.15 at 5.

¹⁵² Ibid at 10.

¹⁵³ See for example Lasser, M., *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (OUP, 2004) at 288.

legal rules.¹⁵⁴ However this is a debatable point of view and against the weight of analysis in the literature where a more general charge is that teleological interpretation is more open to manipulation because of the issue of varying levels of generality.¹⁵⁵ So rather than the CJEU just looking at the spirit and purpose of the Treaty rules the CJEU goes further and also considers the Treaty rule in light of the broader context of the EU legal order – a meta-teleological approach. A classic example of the latter approach is evidenced in *CILFIT*¹⁵⁶ where the CJEU stated that ‘every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objective’s thereof and to its state of evolution at the date on which the provision in question is to be applied’.¹⁵⁷

In respect of academic criticism of the meta-teleological approach,¹⁵⁸ one of the most stringent critics is by Conway. In particular, he has pointed out how the CJEU rarely explains its interpretative method preferring instead a broad purposive approach and an emphasis in its reasoning on the importance of the effectiveness of EU law.¹⁵⁹ Furthermore, he explains the CJEU does not follow the Vienna Convention to the extent that it does not prioritise textual interpretation over teleological interpretation. This he points out is ‘incompatible with a universal conception of legal reasoning’.¹⁶⁰

The consistent failure by the CJEU to make explicit its reasoning and interpretative assumptions he concludes makes inconsistency between cases less

¹⁵⁴ M.Maduro ‘Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism’ 1 (2) European Journal of Legal Studies <<http://www.ejls.eu/2/25UK.pdf>> last accessed 3.1.15 at 10.

¹⁵⁵ See for example M.Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (OUP, 2004) at 288.

¹⁵⁶ Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, [1982] ECR 3415

¹⁵⁷ *Ibid* para 20.

¹⁵⁸ See for example T.Hartley, ‘The European Judicial Objectives and the Constitution of the EU’. (1996) 112 LQR 95 and who argues that the CJEU sometimes interprets provisions of the Treaty contrary to the natural meaning of the words used and has taken place in pursuance of a settled and consistent policy of promoting European federalism e.g. the creation of direct effect in *Van Gend*. See also G.Conway, *The Limits of Legal Reasoning and the European Court of Justice*, (CUP, 2012) 79-83 for a summary of the key literature on the activism of the CJEU.

¹⁵⁹ G.Conway, *The Limits of Legal Reasoning and the European Court of Justice*, (CUP, 2012) at 22.

¹⁶⁰ G.Conway, G., *The Limits of Legal Reasoning and the European Court of Justice*, (CUP, 2012).

obvious and ‘focuses attention on outcomes rather than processes’.¹⁶¹ This does mean that the CJEU is able to promote a pro-Union stance without explicitly stating as such. However, the use of a meta-teleological approach by the CJEU runs the risk of claims of judicial activism and a lack of impartiality and objectivity which challenges the legitimacy of the CJEU in the eyes of the Member States.¹⁶²

This is of particular concern in rulings which have significant impact on national rules such as in the case of *Zambrano*¹⁶³, where as Lansbergen explains ‘the potential impact upon national immigration policy is notable and any unilateral redefinition of the bounds of Union law in such high political sensitivity calls into question the legitimacy of the Court’s action’.¹⁶⁴ The quality of the CJEU’s reasoning in *Zambrano* has also been questioned by De Witte and who writes, ‘the quality of the court’s reasoning has become in the eyes of many observers, more uneven and unpredictable. It also feels free to ignore argument which an intervening State or commission has submitted to it. A recent example of this is *Ruiz Zambrano* judgement in which the Court of Justice mentioned that all 8 intervening States, as well as the Commission, proposed an interpretation, but then went on to adopt another interpretation, without discussion the arguments of the States and the Commission’.¹⁶⁵

¹⁶¹ G.Conway, G., *The Limits of Legal Reasoning and the European Court of Justice*, (CUP, 2012) at 26

¹⁶² See also G.Beck, G., *The Legal Reasoning of the Court of Justice of the EU*, (Hart Publishing 2012) referring to the *Pringle* case and who argues at 449 that the CJEU is keen to protect the European integration process particularly ‘in critical cases and emergency situations [where] written EU law no longer imposes any effective constraints on the judiciary and that in critical cases which may fundamentally affect the integration process within the EU, the Eurozone as a whole, the law is becoming what the judges say it is whatever the new meaning of the written law and whatever the written law actually says’. However, on the other hand, see also S.Careera and B.Petkova, ‘The potential of civil society and human organisations through third-party interventions before the European courts: the EU’s area of freedom, security and justice,’ in B de Wite, E Muir and M.Dawson, (eds) *Judicial Activism at the European Court of Justice*, at 236 who argues that judicial restraint in the field of fundamental rights protection may have disruptive effects on the legitimacy of the CJEU and the EU’s area of freedom of security and justice at large’.

¹⁶³ *Gerardo Ruiz Zambrano v Office National de L’Emploi (ONEM)*, [2011] ECR I-1177.

¹⁶⁴ A. Lansbergen, *Recent CJEU decisions: A case-study in judicial activism*, (2012) European Policy Brief <www.fedtrust.co.uk> accessed 6.7.14.

¹⁶⁵ B de Wite, E Muir and M.Dawson, (eds) *Judicial Activism at the European Court of Justice*, (2013, Edward Elgar Publishing) at 2 citing *C-34/09 Gerardo Ruiz Zambrano v Office National de L’Emploi (ONEM)*, [2011] ECR I-1177 at paras 37 and 39-45. This case is further discussed in chapters 4 and 5 of this thesis.

Secondly, what rights of EU citizens are sacrosanct in light of the Charter of Fundamental Rights when dealing with cases involving the residency rights of EU citizens.

As in the current author's view that each shared policy area requires different criteria to be taken into account when undertaking any review in order to take account of the different policy contexts, there is a consideration of the specific criteria that should be identified by the CJEU when considering the right of residence cases for non-economically active citizens where there is no cross border element with reference to three particular cases of *Zambrano*¹⁶⁶, *Dereci*¹⁶⁷ and *MacCarthy*¹⁶⁸. For if the CJEU adopted such an approach, this will enable the CJEU to anchor subsidiarity and proportionality and help ensure the proper respect for the division of power between the EU and the Member States. In particular, the CJEU needs to identify the limits to the EU's competences through subsidiarity analysis. In the context of EU citizenship cases, the CJEU has done this in its case law on substance of rights (*Zambrano*) and the relaxation of the requirement of a cross border element. However, this is problematic as the relaxation of a cross border element, especially when identifying the limits to its competences through subsidiarity analysis, has the potential to affect the quality of its reasoning and undermine any recommendation to anchor a subsidiarity and proportionality review. Furthermore, any pro-union interpretative tendency by the CJEU when considering the legitimate objectives of the Member States against the general interest of the internal market also has the potential to affect the quality of its reasoning and undermine any recommendation to anchor a subsidiarity and proportionality review. This runs counter to the recent affirmation by the Treaty of Lisbon of subsidiarity and a respect for localism'.

The CJEU also needs to explain why it is important to protect the symbolic status of EU citizenship.¹⁶⁹ For example, it could have explained that EU citizenship plays an important role in helping to foster a perception of shared European identity, the latter being identified as a 'pre-requisite for a functioning democratic

¹⁶⁶ C-34/09 *Gerardo Ruiz Zambrano v Office National de L'Emploi (ONEM)*, [2011] ECR I-1177.

¹⁶⁷ Case C-256/11 *Dereci and others v Bundesministerium fur Inneres*, [2011] ECR I-0000

¹⁶⁸ Case C-434/09 *McCarthy v Home Secretary* [2011] ECR I-0000.

¹⁶⁹ Case C-34/09 *Gerardo Ruiz Zambrano v Office Nationale de L'emploi (ONEm)* [CJEU, 08 March 2011] paragraph 41 the CJEU ruled that 'As the Court has stated several times, citizenship of the Union is intended to be the fundamental status of nationals of the Member States'.

European Policy'.¹⁷⁰ This would include highlighting the symbolic status of EU citizenship and how it has close ties to equality of treatment for all EU citizens in respect of core civil, political and social rights.¹⁷¹

On the other hand, it would also need to justify why in any particular matter, EU citizenship should be allowed to take priority over national citizenship. This would include elaborating in its reasoning as to what the substance of the EU citizenship rights were in this case. It would then need to justify in its ruling that in this case that the substance of the right was so compromised so as not to need to consider any cross-border element. In other words, the CJEU needs to identify a threshold of seriousness in respect of breach of the substance of an EU citizenship right.

Furthermore, it is proposed that the CJEU should then include in its reasoning the factors in any particular case that it had used to inform its judgement and to justify it concluding that the substance of an EU citizens rights was so compromised there was no need to consider any cross-border element.

Finally, and more generally, it is proposed that the CJEU in the future in citizenship cases concerning residency rights needs to do as a minimum is to outline the core substance of rights that is to be protected regardless of the degree of EU competence. For the CJEU to decide on a minimum floor of rights, though, is difficult. However, the rights contained in the European Convention of Human Rights¹⁷² could be a basis for the CJEU to rely upon. For the rights in the

¹⁷⁰ M.Kumm, 'The Idea of Thick Constitutional Patriotism and its implications for the role and structure of European Legal History', (2005) 6 (2) German law Journal 319. See also at 320 for a discussion of the importance of identifying a basis for a common European identity and who argues that the constitutional commitment to human rights, democracy and rule of law could be the basis for a common European identity.

¹⁷¹ For a good example of literature that discusses competing conceptions of fundamental rights see for example J.Waldron, 'Rights in Conflict', (1989) 3 Ethics 503-519. As he explains at 503 'not only do philosophers differ about what rights we have, they differ also on what is being said when we are told that someone has a right to something....according to Nozick, rights are to be thought of as side constraints – limits on the actions that are morally available to any agent...according to Raz, a person may be said to have a right if and only if some aspect of her well-being (some interest of hers) is sufficiently important in itself to justify holding some other person or persons to be under a duty'. See also chapter 2 of this thesis where debate as to whether there needs to be a different theory of adjudication in respect of principles including principles that are fundamental rights is considered further.

¹⁷² European Convention on Human Rights (ECHR) 1950 European Treaty Series No. 05. See also the Universal Declaration of Human Rights <<http://www.un.org/en/documents/udhr/index.shtml>> accessed 30.1.14.

European Convention provide a set of minimum standards¹⁷³ in a Convention that all the Member States of the EU have signed up to. In addition, the EU too is currently in the process of acceding to the European Convention of Human Rights.¹⁷⁴ Thus, it is submitted that CJEU as a minimum should outline the core substance of rights¹⁷⁵ that are to be protected in EU citizenship cases regardless of the degree of EU competence drawing upon the rights contained in the European Convention of Human Rights, even though recently CJEU's opinion 2/13¹⁷⁶ regarding the EU's accession to the European Convention on Human Rights has emphasised the need to preserve the autonomy of EU law when considering human rights protection.¹⁷⁷

4. Sources and Methods

It is widely acknowledged that traditionally the lawyer has been reluctant to articulate the process by which he or she has adopted when analysing law and

¹⁷³ For a more general discussion of the European Convention on Human Rights and the approach of the European Court of Human Rights in balancing the rights in the ECHR with subsidiarity, proportionality and primacy pursuant to the European Convention on Human Rights see J.Christofferson, *Fair Balance: A Study of Proportionality, Subsidiarity and Primacy in the European Convention on Human Rights*, (Brill, 2009) and in particular his contention that there is an obligation on the Contracting Parties to implement the Convention into domestic law as a complement to subsidiarity.

¹⁷⁴ Article 6(2) TEU which declares that the EU shall accede to the ECHR. For a discussion of the legal and political benefits of the EU acceding to the ECHR written prior to the EU's own Charter of Fundamental Rights see L.Betten and N.Grief, *EU law and Human Rights*, (European Law Series, Longman, 1998) and, in particular at 118, their view that accession could strengthen the EU's democratic legitimacy through a commitment to fundamental rights protection of EU citizens.

¹⁷⁵ See J.Christofferson, *Fair Balance: A Study of Proportionality, Subsidiarity and Primacy in the European Convention on Human Rights*, a PhD thesis <[http://www.humanrights.dk/files/pdf/Disputats%20Endelig%202008%2004%2017_%20\(2\).pdf](http://www.humanrights.dk/files/pdf/Disputats%20Endelig%202008%2004%2017_%20(2).pdf)> accessed 14.1.14 at 129 referring to the partly dissenting judgement of Judge Matscher, *Guzzardi v Italy* (6 Nov 1980, Series A, No 39) for a discussion of how although the CJHR talks of the very essence of rights of the ECHR and later at 131 that 'the greatest obstacle to a proper discussion of the analysis of the core of rights is the lack of specificity in the definition or description of the right that may or may not contain an inviolable core'.

¹⁷⁶ Opinion 1/13 8.12.14 <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=160882&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=40247>> accessed 8.1.15.

¹⁷⁷ Ibid at paras 173-200 where the CJEU has therefore asked for a variety of amendments to help preserve the autonomy of EU law. For further discussion see S.Peers, 'The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection', <<http://eulawanalysis.blogspot.co.uk/2014/12/the-cjeu-and-eus-accession-to-echr.html>> accessed 15.1.15. In particular, he argues that such amendments pose a 'clear and present danger to human rights protection' and that 'quite frankly, EU accession to the Convention in the terms defined today by the CJEU could only appeal to those who don't like human rights very much'.

legal reasoning.¹⁷⁸ However, there is currently an increasing interest in articulating more fully the doctrinal legal research process by which lawyers analyse the law and legal reasoning. Hutchinson, for example, has described the doctrinal method of legal research involving two distinct stages.¹⁷⁹ Firstly the researcher needs to identify, locate, read and consider the type of law at issue e.g. whether it is statutory or case law and thereby ‘determine an objective reality, that is, a statement of the law encapsulated in legislation or an entrenched common law principle’.¹⁸⁰ Such a determination is an essential part of doctrinal legal method even where though, as Hutchinson points out, there can be contestation as to what a legal norm entails.¹⁸¹

Secondly, the researcher needs to analyse the relevant law for ‘doctrinal research focuses on legal principle generated by the courts and the legislature’.¹⁸² It is to some extent an internal perspective, rather than a socio-legal approach of looking empirically at the societal impact of the law. Such analysis of the law should involve a consideration of any relevant academic critique or academic discussion of contestation as to what a legal norm entails. It should also involve contextualising the relevant law within the wider legal and theoretical framework. So, for example, in the context of EU law examination of a particular Directive would require the researcher to consider the particular Treaty article that the Directive was adopted under. Furthermore the researcher might also consider the broader theoretical framework of European integration that a particular EU law is situated within.

However, ‘doctrinal research focuses on legal principle generated by the courts and the legislature’¹⁸³ even though, as Hutchinson points out, lawyers frequently do not articulate how they analyse the cases and judicial reasoning, ‘those studying the methodologies of lawyers point to a number of techniques used within the synthesizing process once the documents are located and read.’¹⁸⁴ Firstly he explains how a researcher undertaking complex analysis and synthesis

¹⁷⁸ See for example T.Hutchinson and N.Duncan, ‘Defining and Describing What We Do: Doctrinal Legal Research’, (2012) 17 (1) Deakin Law Review, 84-119 at 84.

¹⁷⁹ T.Hutchinson and N.Duncan, ‘Defining and Describing What We Do: Doctrinal Legal Research’, (2012) 17 (1) Deakin Law Review, 84-119 at 110.

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

¹⁸² Ibid at 116.

¹⁸³ Ibid at 110.

¹⁸⁴ Ibid.

of cases and considering judicial reasoning should outline whether the doctrinal approach they are adopting is ‘conceptual, evaluative or explanatory’ and whether the researcher has utilised analysis which involves ‘the use of deductive logic, inductive reasoning and analogy’.¹⁸⁵ For example, he argues when analysing legal reasoning the approach adopted by a researcher is frequently deductive in that the law is fixed in the form of statute¹⁸⁶ or in the case of EU law a Treaty. On the other hand, where cases are examined, the legal researcher is involved in inductive reasoning which ‘uses a process of arguing from specific cases to a more general rule’ or analogy which ‘involves locating similar situations arising’.¹⁸⁷

With the above two stage process to doctrinal method, initially deductive and then using both deductive and inductive reasoning and the differing methods of analysing judicial reasoning in mind, the research in this thesis draws on a wide range of source material that has been located by the researcher to answer the fundamental research questions outlined in this chapter. This includes a variety of primary and secondary sources. The first type of primary source materials examined are the conventional legal Treaties and secondary EU legislation. Thus the research in this thesis uses standard doctrinal sources, but also relies to some extent on Treaty-based constitutional principle rather than just internal logic or reasoning the case law of the CJEU.

As this thesis includes research which is qualitative in nature¹⁸⁸ and involved in exploring and critiquing various cases in a variety of policy contexts this also involves an analysis and synthesis of a selection of the case law of the CJEU. The cases chosen for analysis are cases concerning shared policy areas and are used as primary sources in this research as they have been selected and considered by the researcher as established precedents as it is widely accepted that the CJEU uses

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ For a definition of qualitative research and how it differs to quantitative research see Dr. S. Williams-Elegbe and E. Ojomo, Introduction to Legal Research, <http://www.yararena.org/uploads/Introduction%20to%20Legal%20Research%20.pdf> >accessed 3.7.14 and who write, ‘Qualitative research, in very general terms, refers to non-numerical research, which is usually categorized as theoretical, while quantitative research is research that has to do with the collection and analysis of numerical data. Legal studies usually rely on qualitative research methods that involve the utilization of study materials, which may be primary or secondary sources, and intellectual analysis of phenomena. Qualitative research may be doctrinal or non-doctrinal, while quantitative research is non-doctrinal’.

precedent as a way of developing its own authority.¹⁸⁹ Cases are an important source in various parts of the thesis because of its focus on the CJEU as a law-making institution and because generally speaking the CJEU has the final say on the interpretation of EU law, apart from suggestions of ‘rebellion’ by some constitutional courts. In contrast, texts written by others and referred to and analysed by the researcher in support of this research are referred to as secondary sources and will form another. Whilst space precludes a full exploration of the merits and the drawbacks of each source material used in this thesis, it is important to explain how such cases have been selected either for examination or to illustrate particular precedents. The focus of such case examination is qualitative and therefore primarily on analysis and synthesis of the judgments of the CJEU with some reference to the opinions of the Advocates General. However, as the opinions of the Advocate General are only advisory, rather less emphasis is placed on these unless they help to explain or criticize a particular point of the CJEU’s judgment in any case.¹⁹⁰

In the discussion on subsidiarity in chapter 3, it is explained how the Treaty itself establishes subsidiarity as a constitutional principle and one that has general application. There is also an analytical review of significant cases where the CJEU has paid attention to subsidiarity in respect of reviewing the actions of the political institutions when law-making. This examination also reveals how the CJEU has been prepared to pay some attention to subsidiarity more generally but that this needs development. In particular, outside of judicial review cases the CJEU has frequently not paid attention to subsidiarity and respect for localism in its interpretation of shared policy areas. This thesis therefore divides selected case law in shared policy areas in this context into two distinct categories for comparative purposes. Firstly cases where the CJEU reviews the actions of the political institutions when law-making in chapter 3. Secondly, the case study in chapter 5 which explores how a subsidiarity review could be anchored in EU law to address competence issues when the CJEU is considering the residency rights of EU citizens who are economically inactive which could arise under the preliminary reference procedure. This will also include a discussion of the criteria that needs to be taken into account by the CJEU when undertaking a subsidiarity

¹⁸⁹ See further Stone Sweet and McGowan, ‘Discretion and Precedent in European Law’, in O.Wikund, (ed.) *Judicial Discretion in European Perspective*, (The Hague: Kluwer, 2003) 109-115.

¹⁹⁰ N.Burows and R.Greaves, *The Advocate General and EU law* (OUP, 2007).

and proportionality review in this particular shared policy context. The reason why the case study in chapter 5 was chosen for examination was on account of the fact that it concerns a shared policy area which involves the CJEU interpreting EU law where there are other competing EU law principles such as fundamental rights and because political symbolism of it links closely to subsidiarity and national identity.

Finally, in support of the analysis of the primary source material, a variety of other documentary sources are referred to throughout the thesis. Such sources include primary sources such as, European Commission reports which have been influential historically in developing the idea of subsidiarity as a political principle. Furthermore, there is also consideration of a variety of secondary sources. Such sources mainly consist of academic writings and in particular published academic literature on subsidiarity and proportionality which is referred to for a range of perspectives. So, for example, this includes in a review of academic literature which critiques the EU's concept of subsidiarity and its use in EU law-making.

5. Chapter overview

Chapter 2 explores subsidiarity and proportionality as twin constitutional principles in EU law making in shared areas of competence and its inherent respect for Member State law-making. It argues that despite subsidiarity being a key constitutional concept in EU law making for mediating the balance of power between the EU and the Member States, it is also an essentially contested concept with reference to Gallie's theory of essentially contested concepts. Such conceptual dissonance, it has been argued, favours judicial discretion on how it should be applied. Consequently, it concludes that there is a compelling argument for judicial reasoning to engage more fully with how the CJEU should deal with such dissonance and determine what can be agreed upon at European level thereby anchoring subsidiarity. Article 5 also includes that the EU institutions when exercising shared competence should comply with the principle of proportionality. This concerns the intensity of any EU legislative action. Proportionality is also defined in Article 5 TEU. It requires that when the EU is bringing in legislation in areas of shared competence that 'the content and form of

Union action shall not exceed what is necessary to achieve the objectives of the Treaties'. Proportionality provides a further safeguard to support subsidiarity and localism in that it ensures that any regulatory freedom of the EU in areas of shared competence is limited to what is necessary to achieve any particular Treaty objective.

The chapter introduces in section 2 subsidiarity as a key constitutional and legal principle and rule in EU law for mediating the balance of power between the EU and the Member States¹⁹¹ and in section 3 proportionality as a widely recognised concept used in judicial review. In section 4 the development of the use of subsidiarity alongside proportionality in EU law-making in areas of shared competence is traced. Here it is argued that despite subsidiarity being adopted as a formal constitutional principle to guide EU law-making in areas of shared competence, it is not a neutral arbiter between the EU level and national level, but inherently pushed towards a respect for local law-making and the legal regimes of the Member States. It is then argued in section 5 that subsidiarity is an example of an essentially contested concept with reference to Gallie's theory of essentially contested concepts¹⁹² and that such conceptual dissonance has the potential to favour judicial discretion on how it is applied. Section 6 then concludes the chapter by further explaining how despite the essentially contested nature of subsidiarity following the Treaty of Lisbon there is a further renewed emphasis on the use of subsidiarity with its inherent respect for local law-making to guide the EU institutions when legislating in areas of shared competence. Such a renewed emphasis is further supported by the introduction of a system of *ex ante* monitoring by the national Parliaments¹⁹³ following the Treaty of Lisbon.

¹⁹¹ For an account of the origins and historical development of subsidiarity see K.Endo, 'The Principle of Subsidiarity: From Johannes Althusius to Jacques Delors', A paper initially submitted in June 1992 as a thesis entitled "Principle of Subsidiarity: Its Origin, Historical Development, and Its Role in the European Community" for the European Studies Programme, *Katholieke Universiteit Leuven* <[http://eprints.lib.hokudai.ac.jp/dspace/bitstream/2115/15558/1/44\(6\)_p652-553.pdf](http://eprints.lib.hokudai.ac.jp/dspace/bitstream/2115/15558/1/44(6)_p652-553.pdf)> last accessed 20.1.14 and also at 613 for a discussion of how in 1949 there was a 'fusion of subsidiarity with federalism' with subsidiarity 'used to explain the relationship between territorial organisations; the supranational polity, the State, the Region and the Local Community in the Grundgesetz, the Basic Law of the Federal Republic of Germany'.

¹⁹² W.B.Gallie, 'Essentially Contested Concepts', (1956) *Proceedings of the Aristotelian Society* 167-98.

¹⁹³ Article 12 (b) TEU provides that 'National Parliaments shall contribute actively to the good functioning of the Union [...] by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality. See also Article 7 of Protocol No 2 on the application of the principles of subsidiarity and proportionality.

The innovative setting up of such an ex ante review procedure illustrates how it is possible to anchor subsidiarity sufficiently to operationalize subsidiarity as a principle of EU law.

Chapter 3 considers whether subsidiarity and proportionality, as twin constitutional principles in EU law-making, should bind the CJEU as law-maker in its interpretation of shared competence areas and, if so, what can be agreed at European level. The chapter also includes in section 2 an introduction to the CJEU as a unique supranational court with particular reference to relevant academic literature which highlights the pro-union interpretative tendency of the CJEU. It also reviews existing case law regarding subsidiarity where it will be pointed out how the CJEU has been prepared to undertake a subsidiarity review in respect of the actions of the political institutions in the context of law-making. Section 2.4 will also firstly revisit, agree with and develop literature in light of the Treaty of Lisbon by De Búrca et al which has argued that the CJEU as a law-making institution it should be bound by subsidiarity when interpreting in areas of shared competence.¹⁹⁴

Secondly, it will explain how Kumm treats proportionality as an aspect of subsidiarity applied to competences.¹⁹⁵ Building on this argument, he then proposes a subsidiarity and proportionality test that the CJEU should employ in the context of the internal market. Such a test, he argues, should include three requirements: ‘federal intervention has to further legitimate purposes, has to be necessary in the sense of being narrowly tailored to achieve that purpose, and has to be proportionate with regard to costs or disadvantages relating to the loss of Member States’ regulatory autonomy’.¹⁹⁶ Kumm does not, however, give much detail as to how the CJEU should undertake a subsidiarity and proportionality review in practice or specify how the CJEU should undertake a subsidiarity and proportionality review involving a balancing exercise or whether different policy areas require different considerations. Nor does he specify exactly what the criteria should be or what factors the CJEU should take into account when undertaking such a balancing exercise. This is problematic as it was argued in

¹⁹⁴ G.De Búrca, ‘The Principle of Subsidiarity and the Court of Justice as an Institutional Actor’ (1998) 36(2) *Journal of Common Market Studies*, 217-23.

¹⁹⁵ M.Kumm, ‘Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union’, (2006) 12(4) *European Law Journal* 503-533 at 505.

¹⁹⁶ *Ibid* at 519.

chapter 2 that subsidiarity is an essentially contested concept, using Gallie's theory of essentially contested concepts.¹⁹⁷ Such conceptual dissonance, it was argued, favours judicial discretion on how it should be applied.¹⁹⁸ For rule of law reasons, a more specific and articulated approach is desirable. Furthermore, the CJEU also has the sole responsibility for interpreting the Treaties.¹⁹⁹ The CJEU surely, therefore, has a responsibility to explain in its reasoning how it has dealt with such dissonance when undertaking a subsidiarity review and the criteria that has informed its reasoning.²⁰⁰

By adopting such an approach, this would help to evidence that its interpretation has taken place within explicitly articulated boundaries. Adopting a normative approach, the final section considers whether it is possible to identify more fully *ex ante* criteria for the application of subsidiarity thereby enabling the CJEU to engage more meaningfully with subsidiarity in its judicial reasoning.

In particular, it will be argued firstly that as a minimum the CJEU should explicitly address competence issues in its reasoning in every case concerning an area of shared competence. For this could help to counter claims that the CJEU displays an unjustified emphasis in its case law on the need to pursue an 'ever closer Union' which deprives Member States of their competencies and is at the expense of the legal systems of the Member States.²⁰¹ It would also be consistent with subsidiarity and its inherent respect for localism in conjunction with the national identity clause in Article 4 (2) TEU. Secondly, it is proposed that the criteria in a balancing test employed by the CJEU should be sector-specific and

¹⁹⁷ W.B.Gallie, 'Essentially Contested Concepts', (1956) Proceedings of the Aristotelian Society 167-98.

¹⁹⁸ For further discussion on literature which highlights out disagreement and dissonance are present in the law more than judicial reasoning sometimes suggests and calls for judicial reasoning to engage more fully with such disagreement and dissonance see for example J.Waldron, *Law and Disagreement* (Oxford University Press, 1999), C.Finkelstein, 'Introduction to the Symposium on conflicts of Rights', (2001) 7(3) *Legal theory* 235-238; J.Waldron, 'Security and Liberty: The Image of balance', (2003) 11(2) *Journal of Political Philosophy* 191-210.

¹⁹⁹ See further B.Vesterdorf, 'A constitutional court for the EU?' President of the Court of First Instance of the European Communities <http://www.ecln.net/elements/conferences/book_berlin/vesterdorf.pdf> accessed 1.8.13 who has also pointed out, the CJEU when performing this role frequently carries out constitutional tasks.

²⁰⁰ Relatedly see also M.Schwartzman, 'The Principle of Judicial Sincerity', (2008) *Virginia Law Review*, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=931435> accessed 14.1.14 for an argument for the principle of judicial sincerity and at 25 a key element of which is 'that judges have a duty to conform with a principle of public legal justification. They must have sufficient reasons for their decisions and they must give those reasons in public'.

²⁰¹ M.Schwartzman, 'The Principle of Judicial Sincerity', (2008) *Virginia Law Review*, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=931435> accessed 14.1.14.

that different criteria should apply for different shared policy sectors where the CJEU is undertaking a subsidiarity review in shared policy areas. Such an approach is necessary in order to take account of the different policy contexts and the particular interests relevant to a particular policy sector, especially where there are competing interests at issue at a supranational level as well as a wide diversity of legal regimes in a particular shared policy area at national level involved. This thesis focuses on the determination of residency rights of EU citizens.

Chapter 4 therefore explores how a subsidiarity review could address competence issues when the CJEU is considering competing fundamental principles of EU law when considering an EU citizens' right to residency. The chapter includes in section 2 a contextualised discussion of the wider concept of citizenship which highlights not only the symbolic importance of the citizenship concept at national level and its association with a set of fundamental political, civil and social rights²⁰² but also the important role in fostering a sense of allegiance to a particular Member State.²⁰³ Secondly, it then reviews literature which reveals how EU citizenship, on the other hand, differs sharply to national citizenship in that EU citizenship was primarily focused on the market rights of citizens as well as being parasitic on national citizenship. For it is only by being a national citizen of a Member State can one acquire EU citizenship. Citizenship cases could therefore be taken as an excellent example of shared competence.

Section 2.1, 2.2 and 2.3 review literature which considers the limits of EU citizenship and in particular literature which highlights that there has been critique of EU citizenship on the grounds that different categories of EU citizens when exercising their residency rights have varying levels of protection from expulsion and this undermines the fundamental status of EU citizenship.²⁰⁴ Section 2.4 considers literature which highlights the problems of differing levels of protection from expulsion for different categories of EU citizens.

²⁰² For further discussion see D.Held, *Models of Democracy*, (Polity Press, Cambridge, 1996) at 176

²⁰³ See further T.Marshall, *Citizenship and Social Class*, (Cambridge: Cambridge University Press, 1950) 28-29.

²⁰⁴ P.Craig and G.de Búrca, *EU Law: Text, Cases and Materials*. (5th ed., Oxford: Oxford University Press, 2011) 757.

Chapter 4 also considers the introduction of EU citizenship provisions into EU law following the Treaty of Maastricht with section 3.3 explaining how the residency rights of EU citizens were subsequently strengthened in Directive 2004/38. Section 3.4 also considers the provisions in Directive 2004/38 concerning the expulsion of EU citizens where they have a right of permanent residence.²⁰⁵ This also includes a discussion of how such provisions have led to the CJEU being called to adjudicate on expulsion of EU migrant citizens' cases which also raise fundamental rights matters that have previously either been the preserve of national constitutional courts at a national level or fundamental human rights at internal level. Such issues have included considering how even though the Charter represented a major step in fundamental rights protection for EU citizens, there are difficulties for EU citizens when seeking to rely on fundamental protection in that 'Article 51 of the Charter 'restricts the incorporation of these European fundamental rights to the implementation situation'.²⁰⁶

Section 3.5 considers the Treaty of Lisbon and the giving of legal effect to a Bill of Rights for EU citizens in the Charter of Fundamental Rights and questions whether the giving of legal effect to the Charter following the Treaty of Lisbon requires that the CJEU at least engages on the grounds of fairness and justice in its reasoning with the practical realisation of EU citizenship for all EU citizens and their family members irrespective of whether they have crossed a border or not with reference to the Charter of Fundamental Rights? On the other hand, this section also explains how EU citizenship is unique in that not only is it parasitic on national citizenship it is constrained by the limits of the EU's competence imposed by the Treaties in areas of shared competence and subsidiarity. The key research question of section 4 is to consider whether the reasoning in the CJEU

²⁰⁵ Article 28(2) of Directive 2004/38. This provision provided that, '2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

(a) have resided in the host Member State for the previous ten years; or

(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.'

²⁰⁶ R. Schütze, in G.De Búrca, D.Kochenov, and A.Williams, 'Debating Europe's Justice Deficit: The EU, Swabian Housewives, Rawls, and Ryanair', (November 14, 2013).EUI Working Paper, LAW 2013/11, 2013. < <http://dx.doi.org/10.2139/ssrn.2354568> > last accessed 1.4.14. at 44.

cases selected for examination concerning the residency rights EU citizens reveal a failure of the CJEU to undertake a subsidiarity and proportionality review, and, if so, if a subsidiarity /proportionality review by the CJEU could be useful/helpful here?

But on the other hand, when the CJEU scrutinises aspects of Member State regulatory regimes which also concern fundamental rights is there is a need for it to act as an arbiter between respect for Member States law and protecting the residence rights of EU citizens with reference to the Charter of Fundamental Rights. This is to examine the competence of the CJEU and its institutional placing at a supranational level as suited to adjudication of citizenship residency rights.

The main contribution of chapter 4 is to argue firstly that as there is a need for the CJEU to act as an arbiter that specific criteria should be identified in this context in order to anchor subsidiarity and proportionality and help ensure the proper respect for the division of power between the EU and the Member States.

Secondly, to acknowledge that even though engaging more meaningfully with subsidiarity will not necessarily prevent the CJEU from displaying a pro-Union interpretative tendency²⁰⁷ the adoption of a subsidiarity and proportionality review would help to improve the quality of the reasoning of the CJEU and consequently enhance the legitimacy of the CJEU's ruling.²⁰⁸ This would help to legitimise the CJEU's ruling to the Member States and address the problem of CJEU rulings lacking legitimacy.²⁰⁹

Chapter 5 forms a case study which develops a normative approach as the critique in chapter 4 is based on normative considerations. It explores how a subsidiarity review could be anchored in EU law to address competence issues when the CJEU is considering fundamental principles of EU law and residency rights of EU citizens who are economically inactive. It proposes a sequence of how the CJEU

²⁰⁷ This is discussed in section 2.2 of chapter 3.

²⁰⁸ N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.'

²⁰⁹ N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.'

should apply a subsidiarity and proportionality review in the reasoning of the CJEU. As subsidiarity is prior to proportionality the CJEU should include first in its reasoning in these types of cases a clear justification of EU competence in this context so as to draw out the limits of EU competence. As subsidiarity in these types of cases relates to the cross border requirement, the CJEU should be explicit about departing from the purely internal rule as well as explaining the substance of rights of EU citizens. The proportionality element of the review relates to the actual consideration and weighing up by the CJEU of the competing interests identified in this context. This requires the CJEU to identify explicitly in its reasoning any competing interests that have been weighed up as well as stating any other particular factors involved in the balancing and the weight accorded to those factors.

This discussion also includes a consideration of the criteria that might inform the CJEU when undertaking a balancing test as part of a subsidiarity review in cases involving the residency rights of non-economically active EU citizens. The case for determining the specific criteria in order to anchor a subsidiarity and proportionality review in this context is compelling. In particular, it raises difficult questions as to the intensity of any proportionality review and how the CJEU should justify in its reasoning how it has struck a balance between any competing issues. The improvement of the quality of the CJEU's reasoning is becoming an increasingly important matter in light of the impending accession of the EU's accession to ECHR.²¹⁰ For following accession of the EU to the ECHR, the CJEU will be measured against human rights standards in its case law and does not want to be found lacking in its reasoning when balancing conflicting issues. However, on the other hand, the CJEU must demonstrate that it is respecting localism and the wording and purpose of the Treaties.²¹¹ It would also involve the CJEU citing

²¹⁰ Council of Europe, Accession of the EU to the European Convention on Human Rights, <http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/default_en.asp> accessed 14.1.14. See also the CJEU's opinion 2/13 Opinion 1/13 8.12.14 <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=160882&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=40247>> accessed 8.1.15. regarding the EU's accession to the European Convention on Human Rights where the CJEU has emphasised the need to preserve the autonomy of EU law when considering human rights protection. See also the Editorial comments, 'The EU's Accession to the ECHR – a No from the ECJ', (2015) Common Market Law Review, 1-16.

²¹¹ See the recent speech by the UK Attorney General <<https://www.gov.uk/government/speeches/the-future-of-europe-opportunities-and-challenges>>] accessed 15.1.14 and who states that, 'The EU can only be effective, successful and above all legitimate if the EU is seen to respect the letter and spirit of the Treaties. In other words, the EU must respect the rule of law'.

in its reasoning the specific criteria it used when undertaking a subsidiarity and proportionality review. Judicial discussion of these issues would also benefit from being supported by greater access to information and empirical research in this context.²¹² By being explicit in its judicial reasoning about the nature of the key issues and tensions in this context and how the CJEU had balanced these, this would help to justify the CJEU's ruling. It would also ensure that the CJEU reasoning goes beyond a merely theoretical and abstract level of judicial reasoning when striking the balance between competing issues. Thus, the thesis helps to address the complexity of the factors to be taken into account. Furthermore, even though engaging more meaningfully with subsidiarity will not necessarily prevent the CJEU from displaying a pro-Union interpretative tendency²¹³ the adoption of a subsidiarity and proportionality review would help to improve the quality of the reasoning of the CJEU and consequently enhance the legitimacy of the CJEU's ruling.²¹⁴

6. Preliminary Conclusions

The contributions of this thesis are threefold:-

From a theoretical point of view, it adds to existing academic debate concerning the contested nature and scope of subsidiarity by testing whether subsidiarity is a contested concept with reference to a set of conditions put forward by Gallie that he argues must be satisfied in order for a concept to be deemed essentially contested.²¹⁵ The result of such examination is that the subsidiarity concept clearly meets the various conditions that Gallie has argued must be fulfilled but that it can be anchored.

²¹² A similar idea has been mooted in the context of the European Court of Human Rights where there has been discussion of creating a Research Division within the ECHR's Registry by S.Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (2006) 189. See also G.Rutherglen, 'Title VII Actions', (1980) 47 U Ch LR at 713 for how elaborate statistical evidence has been vital in the development of disparate impact cases in America when considering justifications put forward by Member States for their state social security rules. See also Rasmussen, *On Law and Policy* (Martinus Nijhoff Publishers, Dordrecht, 1986) who argued that the CJEU should make greater use of socio-economic data.

²¹³ This will be considered further in section 2.2 of chapter 3.

²¹⁴ N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.'

²¹⁵ Gallie Op Cit.

From a doctrinal perspective it agrees with and develops an argument by De Búrca that the CJEU is a law-making institution by proposing that following the Treaty of Lisbon and in light of the national identity clause there is now an even greater need for the CJEU²¹⁶ to utilise subsidiarity in its interpretation of shared policy areas. This raises the question of how subsidiarity, as a contested concept, could be anchored in EU law by the CJEU to help ensure the proper respect for the division of power between the EU and the Member States in areas of shared competence by determining what could be agreed upon at European level i.e. contestation does not prevent a workable anchoring of the principle.

Finally, adopting a normative perspective the thesis then considers how the CJEU could operationalise a subsidiarity review by developing a proposal by Kumm of how the CJEU could employ subsidiarity and proportionality as an aspect of subsidiarity applied to competences generally or shared competences as a tool of judicial review.²¹⁷ This includes relating de Búrca's key argument that as the CJEU interpretation itself constitutes law-making that it should be informed by subsidiarity when exercising that power²¹⁸ to an observation made by Kumm regarding the operationalisation of a subsidiarity and proportionality test. This observation by Kumm is that although there is an important role for the judiciary in applying a subsidiarity and proportionality test 'the subsidiarity and proportionality framework clearly does not establish simple and easy to apply rules that produce uncontentious, easy to derive conclusions in the great majority of cases'.²¹⁹ Thus this thesis includes considering whether there is a single test in different areas or whether more sector specific criteria can be identified, especially where there are policy areas which already involve the CJEU considering other EU law concepts that are essentially contested such as EU citizenship. It then proposes that each shared policy area requires different criteria

²¹⁶ For a discussion of the role of the CJEU and European legal integration see for example J.Bengoetxea, N. MacCormick, and L.Moral Soriano, 'Integration and Integrity in the Legal Reasoning of the European Court of Justice' in de Búrca, G. and Weiler, J.H.H. (eds) *The European Court of Justice* (Oxford: Oxford University Press, 2001), pp. 43- 86; M.Cappelletti, M.Seccombe, J.H.H.Weiler, *Integration through Law: European and the American Federal Experience: Vol 1: Methods, Tools and Institutions* (Berlin/New York: Walter de Gruyter, 1985) 86.

²¹⁷ M.Kumm, 'Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union', (2006) 12(4) *European Law Journal* 503-533 at 505.

²¹⁸ G. De Búrca, 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor' (1998) 36(2) *Journal of Common Market Studies*, 217-23.

²¹⁹ M.Kumm, 'Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union', (2006) 12(4) *European Law Journal* 503-533 at 525.

to be taken into account by the CJEU when undertaking any review in order to take account of the different policy contexts and whether there are any competing interest relevant to a particular policy sector that require balancing. In developing the criteria for subsidiarity the approach is to try and specify it and make it rule-bound as much as possible, as this would relate it back to the rules-principles distinction.²²⁰ This relates to the rule of law, principles of certainty and predictability²²¹ and, by adopting such an approach, this should better legitimize genuinely European standards that have a clear legal basis. Subsidiarity, as it stands, is presented as more of an incommensurable principle by its critics,²²² and thus not so suited to adjudication.²²³

The thesis then focuses on one particular shared policy context – determining the rights of EU citizens in chapter 4 - as a lens to explore how a subsidiarity and proportionality review could address competence issues. A final chapter 5 then adopts a normative approach. It proposes a sequence of how the CJEU should apply a subsidiarity and proportionality review in the reasoning of the CJEU. As subsidiarity is prior to proportionality the CJEU should include first in its reasoning in these types of cases a clear justification of EU competence in this context so as to draw out the limits of EU competence. The proportionality element of the review relates to the actual consideration and weighing up by the CJEU of the competing interests identified in this context. This requires the CJEU to identify explicitly in its reasoning any competing interests that have been weighed up as well as stating any other particular factors involved in the balancing and the weight accorded to those factors. It also includes consideration of the criteria involved in any judicial balancing that the CJEU would need to take into account when undertaking a review in this particular shared policy context and how intensive such a review should be.

²²⁰ For further discussion on the difference between legal rules and principles see R.Dworkin, 'The Model of Rules I', in: *idem, Taking Rights Seriously* (Harvard University Press Cambridge 1987) 14 at 25-26.

²²¹ B.Tamanaha, *On the Rule of Law: History, Politics, Theory*, (Cambridge: Cambridge University Press, 2004)

²²² See for example K. Möller, 'Proportionality: Challenging the critics', (2012) 10 (3) *International Journal of Constitutional Law* 709-731 at 730; P.G.Carrozza, 'Subsidiarity as a structural principle of international human rights law', (2003) 97 *The American Journal of International law*, 38 at 78.

²²³ See chapter 2 for further discussion of the contested nature of subsidiarity in the literature.

It is also emphasised in chapter 5 that any subsidiarity and proportionality review undertaken by the CJEU in cases concerning the residence rights of EU citizens including those who are economically inactive should at the very least involve the CJEU making explicit reference in its reasoning to, on the one hand, how it has respected subsidiarity and demonstrated a respect for localism in the particular case at issue. This should include considering the financial implications and what potential impact might be on immigration for that particular Member State of ruling that particular national legislation is contrary EU law. Access to socio-economic data or discussion with the national referring court could be helpful here in informing the CJEU's consideration of this issue²²⁴ and being more specific about 'unreasonable burden'. The CJEU has ignored Rasmussen's critique of its role in this respect, but it has all the more relevance in a subsidiarity context. Far-reaching economic effects, for example, would suggest the CJEU is intruding upon fiscal competence, which remains with the Member States. Any views of the EU institutions in this context and their reasons for favouring local law-making over centralised action should be explicitly stated. For, and as Kumm has pointed out, the advantages of local law-making over centralised action are three fold and encompass efficiency, democracy and preserving the identities of citizens of the Member State which is easier at a local level than a European level.²²⁵

But on the other hand, in cases concerning a the residence rights of economically inactive EU citizens and their family members, the CJEU would also need to demonstrate that it had taken account of Article 7 of the Charter of Fundamental Rights as well as considering if the substance of an EU citizens rights had been compromised such that it does not need to consider any actual cross-border element. By explicitly including in its judgement the sector-specific criterion it had employed when weighing up such issues in citizenship cases where there are issues relating to Article 7 and the weight given by the CJEU to each criterion, this would anchor subsidiarity.

It will also be proposed that the sector-specific criteria for the CJEU to consider in this context should include the following:-

²²⁴ See also Rasmussen's conclusion that the CJEU needed to take into account more socio-economic data in its adjudication: H. Rasmussen, *On Law and Policy of the European Court of Justice* (Kluwer 1986)

²²⁵ Kumm Op Cit 581.

Firstly, in respect of the subsidiarity element of the review, what is the overall degree of competence that has been transferred to the EU in any particular policy area? This would include considering both the general and the specific competence and whether competence involves an internal market provision. This is an important question as the CJEU has frequently adopted an expansionary approach when approaching competence in internal market cases.²²⁶

Furthermore, and as Craig has pointed out there is the new Impact Assessment strategy which ‘constitutes a framework within which to address concerns as to competence anxiety.’ This, he concludes should make easier judicial review in that the CJEU could examine the Commission’s discussion from any Impact Assessment undertaken.²²⁷ Thus it is vital that the CJEU needs to ensure that in performing judicial review when approaching competence questions in this context that it reviews any relevant Impact Assessments.

Secondly, the CJEU also needs to consider what the minimum standards have been established under the European Convention on Human Rights on this and to include in its reasoning why it is not enough just to rely on these. Here subsidiarity can be related to the divide between international law and EU law: the CJEU needs to explain why it is not leaving human rights to the ECHR.²²⁸ The CJEU here could draw upon an argument by Schütze that there has been a conceptual shift of emphasis in EU federal philosophy from a dual federalism to co-operative federalism and that the latter encompasses the idea that the EU and Member States work together in a shared legal sphere.²²⁹ Thus when the EU accedes to the ECHR it has a duty in conjunction with the Member States to ensure compliance in the shared legal sphere with ECHR standards rather than simply leaving the matter to the ECHR court.²³⁰

²²⁶ Gareth Davies, *Subsidiarity: The Wrong Idea, In the Wrong Place, At the Wrong Time*, (2006) 43 CMLREV 63 at 65.

²²⁷ Gareth Davies, *Subsidiarity: The Wrong Idea, In the Wrong Place, At the Wrong Time*, (2006) 43 CMLREV 63 at 191.

²²⁸ See further R.Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law*, (2009, OUP)

²²⁹ Ibid for a consideration of the federal philosophy that informs the EU’s legal structure and in particular an argument of how the EU legal system has evolved from dual federalism (which encompasses the philosophical idea of dual sovereignty where both governmental bodies are co-equals) to co-operative federalism (which encompasses the philosophical idea that two governmental bodies work together in a shared legal sphere).

²³⁰ See also the recent opinion of the CJEU Opinion 2/13, ECHR, EU: C: 2014:2454 where the CJEU has held that the draft agreement as currently drafted is incompatible with Article 6(2) and

On the other hand, in the proportionality element of the review, the CJEU would also need to demonstrate to the Member States' that there has been proper respect when weighing up conflicting issues to the division of power between the EU and the Member States in cases involving protecting the private and family rights of EU citizens/carers of EU citizens. By adopting such an approach the CJEU would be acting as an arbiter in this context. It would also serve to anchor subsidiarity and proportionality and by including how it had undertaken a subsidiarity and proportionality review in its reasoning would demonstrate the proper respect for the division of power between the EU and the Member States.

Thirdly that an important issue the CJEU needs to address in all such cases is when are the substance of rights compromised such that it does not need to consider any actual cross-border element. The CJEU needs to identify a minimum threshold although arguably the presumption must be against this being necessary in most cases, because the European Convention on Human Rights has already done this. This would involve a consideration of whether it is possible to identify whether there is a minimum core of EU rights that are so sacrosanct that there is no need to consider any actual cross border element and the relationship with the European Convention on Human Rights and national constitutional traditions. The CJEU needs to do this much more systematically.

In respect of considering the national measure at issue that use could be made of a test suggested by Alexy.²³¹ He proposed that a graduated scale for national measures which contained three levels – serious, moderate and minor – could be applied when considering national measures although such an approach does run

Protocol No 8 EU and the Editorial comments, The EU's Accession to the ECHR – a 'No' from the ECJ!', (2015) 52 Common Market Law Review 1-16 where it is pointed out how 'the Court argues that the agreement is likely to have an adverse effect on the autonomy of European Union law and its specific characteristics (referred to in Protocol No 8 EU), notably relating to its own position and competences within the EU legal system.'

²³¹ R.Alexy, *A Theory of constitutional Rights*, translated by J.Rivers, (OUP, 2002) 401-414. See also J. Habermas *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (1998) 259-260; K. Moller, 'Proportionality: Challenging the Critics', (2012) 10(3) International Journal of Constitutional Law 709 for a critique of Alexy's theory of balancing as subjective.

the risk of opening up more potential for judicial discretion e.g. where on the scale is the line drawn between a minor and a more serious measure.²³²

Fourthly, to consider how the CJEU approaches balancing the tension between a citizens rights in a particular policy context and any legitimate objectives of the Member States in a particular context. Here, the CJEU could draw inspiration from the ECHR approach in this context and ask a series of questions about the national legislation at issue²³³. Such questions could include asking whether there is a legitimate aim for a particular national measure and, if so, whether the particular national measure was both a necessary and proportionate way to implement that legitimate aim. It would also entail the CJEU weighing up the seriousness of the national measure at issue against the need to balance the interests of society with those of individuals and groups. In addition, and as Alexy points out, it is crucial for judges when balancing to assess the level of interference with a particular right and that where there is considerable interference that this requires the CJEU to demand good and valid reasons to justify such great interference.²³⁴

Fifthly, that it is important for the CJEU to list the factors that it has taken into consideration when undertaking such a balancing exercise²³⁵ in order to anchor subsidiarity and proportionality and help ensure the proper respect for the division of power between the EU and the Member States. This would be especially important in areas where the EU is acting on the edge of its competence such as in relation to social security or immigration. Here the need for the CJEU to include a subsidiarity and proportionality review and be explicit in its reasoning of how it had considered subsidiarity, weighed up the seriousness of the national measure at issue against the need to balance the interests of society with those of individuals and groups as well as demonstrating a respect for localism by giving more weight

²³² R.Alexy, *A Theory of constitutional Rights*, translated by J.Rivers, (OUP, 2002) 401-414. See also J. Habermas *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (1998) 259-260.

²³³ See also *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*, [1999] 1 AC 69,80 where the Privy Council defined the questions generally to be asked in deciding whether a measure is proportionate are, ‘whether (1) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective’.

²³⁴ R.Alexy, *A Theory of constitutional Rights*, translated by J.Rivers, (OUP, 2002) 401-414.

²³⁵ See the recent case of *Huang v Secretary of State for the Home Department Kashmiri v Secretary of State for the Home Department*, [2007] UKHL 11 at para 19-20 where the HL controversially said that the national courts should be doing the balancing here.

to the Member State's right to regulate is the most compelling. This would involve the CJEU adopting a more systematic approach to competences: identifying more clearly the limits of EU competence, the importance of special competence over general competences and respecting the limits of shared competences, such as Article 114 TFEU (ex Article 95 TEC) and taking a more deferential approach to matters raising fiscal implications for Member States in order to respect the fiscal competence of the Member States.

Finally, it is anticipated that this thesis would contribute to the wider debates about what kind of national measures should be seen as obstacles in shared policy areas (especially the internal market). It is also anticipated that the thesis could offer lessons generalizable beyond this context in respects of the benefits of the CJEU adopting the structured approach to subsidiarity and proportionality proposed in this thesis in all cases concerning shared policy areas, the latter being a particularly fertile area for future research. Even though engaging more meaningfully with subsidiarity will not necessarily prevent the CJEU from displaying a pro-Union interpretative tendency²³⁶ the adoption of a subsidiarity and proportionality review would help to demonstrate the procedural legitimacy of the CJEU's ruling. This would help to improve the quality of the reasoning of the CJEU and consequently enhance the legitimacy of the CJEU's ruling.²³⁷

²³⁶ This will be considered further in section 2.2 of chapter 3.

²³⁷ N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.'

Chapter 2

Subsidiarity and Proportionality as twin constitutional principles for mediating the balance of power between the EU and the Member States

1 Introduction

2. Subsidiarity as a key constitutional principle for mediating the balance of power between the EU and the Member States

2.1 Introduction

2.2 The Adoption of subsidiarity as a legal and constitutional principle by the EU to limit unnecessary EU intervention

3 Proportionality as a widely recognised concept used as a test in judicial review

3.1 Introduction

3.2 Proportionality as a widely recognised concept used as a test in judicial review of public acts at national level

3.3 The differing interpretations of the operationalization of proportionality

3.4 Differing levels of intensity of judicial review by the CJEU of national restrictions in light of the proportionality principle

4 Subsidiarity and Proportionality in EU law-making in shared areas of competence

4.1 A conceptual link between conferral, subsidiarity and proportionality

4.2 Subsidiarity alongside proportionality in EU law-making in shared areas of competence

5 Is EU Subsidiarity an essentially contested concept?

6 Subsidiarity and the introduction of the yellow card procedure following the Treaty of Lisbon

7 Conclusion

1. Introduction

This chapter introduces the concepts of subsidiarity and proportionality as twin constitutional principles and rules²³⁸ for mediating the balance of power between

²³⁸ Article 5 (3) TEU, in conjunction with the Protocol on subsidiarity and proportionality. See also the Protocol on the application of the principles of subsidiarity and proportionality, Consolidated Texts of the EU Treaties as amended by the Lisbon Treaty, pages 204 to 207 (Cm 7310) and House of Commons European Scrutiny Committee ‘Subsidiarity, National Parliaments

the EU and the Member States in the context of the development of EU law and the European integration process.²³⁹ They were adopted by the EU as legal rules to guide the EU law-making institutions when law-making in shared competence areas following the Treaty of Maastricht.²⁴⁰ The current law is located in Article 5(3) TEU.²⁴¹

One objective of this chapter is to explain how the more rule like subsidiarity and proportionality are, the more it can be said they anchored and are less contested. On the other hand, if they are more in the domain of principles the more likely they are to being contested. It has been argued that there is a clear distinction between legal rules and principles especially in terms of the respective standards that each sets. Dworkin is prominent amongst the theorists in explaining that not only do principles and rules each have a distinctive set of standards but they differ in the character of the direction they give.²⁴² As he explains, ‘the difference between legal principles and legal rules is a logical distinction. Both sets of standards point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they give. Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision. But this is not the way principles operate. All that is meant, when we say that a particular principle is a principle of our law, is that the principle is one which officials must take into

and the Lisbon Treaty’ Thirty-third Report of Session 2007–08
 <<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/563/563.pdf>> last
 accessed 12.7.12. for a discussion of this Protocol..

²³⁹ For a general discussion of both the theoretical and the legal dimension of European legal integration, see P.Craig, and G. de Búrca, *EU Law: Text, Cases and Materials*. (5th ed., Oxford: Oxford University Press, 2011) 2-5 and A.Wiener and T.Diez, *European Integration Theory*, (OUP, 2009).

²⁴⁰ Treaty on European Union (Maastricht Treaty) [1992] OJ C 190/1.

²⁴¹ See also the Protocol on the Application of the Principles of Subsidiarity and Proportionality [1997] OJ C 340/105.

²⁴² R.Dworkin, ‘The Model of Rules I’, in: *idem, Taking Rights Seriously* (Harvard University Press, Cambridge 1987) 14 at 25-26. For discussion of the wider context that this view takes place within see also Dworkin’s attack in his book *Law’s Empire*, (1986, Harvard University Press) on a key tenet of positivism espoused by the jurisprudential theorist Hart that law and morality are not necessarily connected. In respect of further discussion of Hart’s view of positivism see H.L.A Hart, *The Concept of Law*, (1994, Oxford, Clarendon Press) at 185-86. In particular, he writes that legal positivism is ‘the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy demands of morality, though in fact they have often done so’, and at 268 that ‘though there are many different contingent connections between law and morality there are no necessary conceptual connections between the content of law and morality.’

account, if it is relevant, as a consideration inclining in one direction or another. This first difference between rules and principles entails another. Principles have a dimension that rules do not the dimension of weight or importance'.²⁴³ Thus he argues that the key theoretical difference between legal rules and principles is that it is only the latter that has the 'additional dimension of weight or importance'.²⁴⁴

Building upon the literature regarding the theoretical distinction between legal principles and rules, there has been debate as to whether there needs to be a different theory of adjudication in respect of principles including principles that are fundamental rights. For example, Alexy has built on this jurisprudential debate by Dworkin that principles differ from rules in that principles are optimization requirements.²⁴⁵ This means, according to Alexy, that satisfying principles varies and that 'the appropriate degree of satisfaction depends not only on what is factually possible but also on what is legally possible'.²⁴⁶ The fact that principles are optimisation requirements, he then explains, have particular implications in the event of a conflict between one principle and another principle.²⁴⁷ In particular, he points out how such principle conflict can take different forms. For example, Alexy points out that even though both principles are valid one principle might outweigh the other in certain circumstances. Such a balancing exercise necessarily involves a balancing of the competing interests associated with each principle in light of what is legally and factually possible in order to determine which principle should take priority.²⁴⁸ To illustrate how a court has determined which competing principle had the greater weight in the actual case before them, Alexy cites a German Federal Constitutional court case.²⁴⁹ In this case the German Constitutional Court was faced with a 'tension between the duty of the state to maintain a properly functioning criminal justice system and the interest of the accused in his constitutionally guaranteed rights, which the state is also obliged to protect under the Basic Law'.²⁵⁰ Such tension

²⁴³ The difference between legal rules and principles is explained by R.Dworkin, 'The Model of Rules I', in: *idem, Taking Rights Seriously* (Harvard University Press Cambridge 1987) 14 at 25-26.

²⁴⁴ *Ibid.*

²⁴⁵ R.Alexy, *A Theory of Constitutional Rights*, (New York: Oxford University Press, 2002) 47.

²⁴⁶ *Ibid* 48.

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid* at 50.

²⁴⁹ R.Alexy, *A Theory of Constitutional Rights*, (New York: Oxford University Press, 2002) 47 citing BVerfGE 51, 324.

²⁵⁰ R.Alexy, *A Theory of Constitutional Rights*, (New York: Oxford University Press, 2002) 47 citing BVerfGE 51, 324.

was resolved by the German Constitutional Court balancing the conflicting interests and determining ‘which of the requirements having equal status in the abstract had the greater weight in the concrete case’.²⁵¹

These points in his theory of adjudication, however, have not gone unchallenged. For example, Poscher has argued that not only does the theory fail in making the case for there being a structural difference between rules and principles but that it views adjudication as being only possible by either subsumption or balancing.²⁵² Rather he makes the case that a theory of adjudication should involve a variety of techniques of adjudication which,

‘always include subsumption by mere rule-following and sometimes even balancing in the sense of an optimization requirement, alongside an array of further methods and combinations of all the techniques. For any given norm, adjudication may consist of mere rule-following in easy cases, of more complex analytical considerations when it comes to more complex cases, and of yet more complex argumentations and evaluations in hard cases, where even the balancing of legally protected rights in sense of an optimization requirement may play a role’.²⁵³

So Poscher proposes that a theory of adjudication should involve a variety of techniques especially where there are cases which involve the balancing of competing rights. He therefore argues that Alexy fails to account fully for the relationship between rules and principles. Consequently, Poscher argues, in respect of formulating a theory for adjudication of fundamental rights, the theory

²⁵¹ R.Alexy, *A Theory of Constitutional Rights*, (New York: Oxford University Press, 2002) 47 citing BVerfGE 51, 324.

²⁵² R.Poscher, ‘Insights, Errors and Self-Misconceptions of the Theory of Principles’, (2009) 22(4) *Ratio Juris* 425-54. Subsumption has been described by A. Peczenik, *On law and reason*, (1989, Springer Science and Business Media, Dordrecht), 19 as ‘a logical consequence of a set of premises, containing a statutory premise, precedent etc, together with other relevant norms, value statements and the description of the facts of the case’. Balancing is broadly understood as involving the weighing of conflicting interests, although as Shauer points out in F.Shauer, ‘Balancing, Subsumption and the Constraining Role of legal text, (2009) <<http://law.bepress.com/cgi/viewcontent.cgi?article=1197&context=uvalwps>> accessed 6.6.15 there are difficult questions ‘about the level of generality at which the competing interests ought to be described and understood’, and ‘about the attributes of the competing interests that should be taken into consideration’. Such difficulties have led T.Aleinikoff, “Constitutional Law in the Age of Balancing,” *Yale Law Journal*, vol. 96 (1987), pp. 943 to argue that balancing is more problematic on account of ‘its ubiquitous nature’.²⁵²

²⁵³ R.Poscher, ‘Insights, Errors and Self-Misconceptions of the Theory of Principles’, (2009) 22(4) *Ratio Juris* 425-54 at 439.

of principles cannot be a doctrinal theory of fundamental rights for where there is a contravention of a fundamental principle there is no room for balancing. So, for example, regarding the example of the principle of proportionality, this demands ‘a loose plausibility control to ensure that the measure is not grossly disproportionate’.²⁵⁴ However, academics have queried the use of judicial balancing on the grounds that judicial balancing is subjective²⁵⁵ and unpredictable. So, for example Habermas has argued that balancing is ‘arbitrary and rash’.²⁵⁶ Other critics too have stressed the difficulties of weighing up competing principles when there is ‘no common currency for making possible a comparison’²⁵⁷ i.e. the problem of determining the correct weight.

With the above theoretical debate in mind, the key aim of this chapter is to argue that despite the principle of subsidiarity being a key constitutional concept alongside proportionality in EU law-making for mediating the balance of power between the EU and the Member States in areas of shared competence that the principle of subsidiarity is also an essentially contested concept using Gallie’s theory of essentially contested concepts.²⁵⁸ Such conceptual dissonance, it will be argued, favours judicial discretion on how it should be applied.²⁵⁹ Gallie’s idea also helps elaborate on the more problematic character of principles and the difficulties this poses in adjudication.

Legal reasoning by the CJEU needs to address this issue of discretion. A subsequent chapter will then consider how subsidiarity, as a contested concept, could be anchored in EU law by the CJEU to help ensure the proper respect for

²⁵⁴ Ibid at 435.

²⁵⁵ For a critique of balancing in the German Federal Constitutional Court see J.Habermas, *Between Facts and Norms: Contributions to a Discourse theory of Law and Democracy*, (1996), W. Rehg (trans.). Cambridge, MA: MIT Press. German, 1992)

²⁵⁶ J. Habermas, *Faktizität und Geltung*, (Frankfurt, 1994,) 316

²⁵⁷ T. Aleinikoff, ‘Constitutional Law in the Age of Balancing’, (1987) 96 Yale Law Journal 973.

²⁵⁸ W.B.Gallie, ‘Essentially Contested Concepts’, (1956) Proceedings of the Aristotelian Society 167-98.

²⁵⁹ This is related to the distinction drawn by R.Dworkin, ‘The Model of Rules I’, in: *idem, Taking Rights Seriously* (Harvard University Press Cambridge 1987) 14 at 25-26 between rules and principles namely that rules are applicable in an all-or-nothing fashion whereas principles are ‘a consideration including in one direction or another,’ and thus principles have a dimension that rules do not. This is the dimension of weight or importance’. For further discussion on literature which highlights how disagreement and dissonance are present in the law more than judicial reasoning sometimes suggests and calls for judicial reasoning to engage more fully with such disagreement and dissonance see, for example, J.Waldron, *Law and Disagreement* (Oxford University Press, 1999), C.Finkelstein, ‘Introduction to the Symposium on conflicts of Rights’, (2001) 7(3) Legal theory 235-238; J.Waldron, ‘Security and Liberty: The Image of balance’, (2003) 11(2) Journal of Political Philosophy 191-210.

the division of power between the EU and the Member States in areas of shared competence and what could be agreed upon at European level. For by anchoring subsidiarity by using exemplars in order to demonstrate what is nearer to the heart of subsidiarity, this helps to minimise the risk of a dispute as to how it should be operationalized in adjudication. Such an approach would directly address a key concern raised by Gallie that essentially contested concepts are at continual risk of being disputed²⁶⁰ and provides a useful conceptual framework in this thesis for helping to identify the core of subsidiarity.

Section 2 and 3 discusses the broader conceptual meaning and origins of both subsidiarity and proportionality. In particular, section 2 introduces subsidiarity as a key constitutional and legal principle and rule in EU law.²⁶¹

Section 3 provides a contextualised discussion of how proportionality is a widely recognised concept used as a test in judicial review and that there are differing interpretations of the operationalization of proportionality. Section 3 then focuses on explaining how proportionality in EU law has been recognised both as a general principle of EU law as well evidenced in practice from the reasoning of the CJEU.²⁶² In particular, it will be pointed out in this section that in EU law the use of proportionality by the CJEU needs to be accompanied by a clear, consistent and principled approach to its content and structure in order to provide a clear doctrinal test that the CJEU can utilise in its case law. So, for example, the CJEU should give reasons and justify in its ruling following assessment of both the empirical and normative dimensions of a proportionality review to ensure the legitimacy of its decision. This relates to the rule of law principles of certainty and

²⁶⁰ W.B.Gallie, 'Essentially Contested Concepts', (1956) Proceedings of the Aristotelian Society 167-98 at 169.

²⁶¹ For an account of the origins and historical development of subsidiarity see K.Endo, 'The Principle of Subsidiarity: From Johannes Althusius to Jacques Delors', A paper initially submitted in June 1992 as a thesis entitled "Principle of Subsidiarity: Its Origin, Historical Development, and Its Role in the European Community" for the European Studies Programme, *Katholieke Universiteit Leuven* <[http://eprints.lib.hokudai.ac.jp/dspace/bitstream/2115/15558/1/44\(6\)_p652-553.pdf](http://eprints.lib.hokudai.ac.jp/dspace/bitstream/2115/15558/1/44(6)_p652-553.pdf)> last accessed 20.1.14 and also at 613 for a discussion of how in 1949 there was a 'fusion of subsidiarity with federalism' with subsidiarity 'used to explain the relationship between territorial organisations; the supranational polity, the State, the Region and the Local Community in the Grundgesetz, the Basic Law of the Federal Republic of Germany'.

²⁶² See Case 11/70 *Internationale Handelsgesellschaft mBH v Einfuhr und vorratsstelle für Getreide und Futtermittel* where the CJEU found that the EC regulatory measures were proportionate and consequently not infringing the right to property. See also T.Inge Harbo, 'The Function of the Proportionality Principle in EU Law', (2010) 16(2) European law Journal for a discussion of the function of the proportionality principle as a general principle of law in terms of securing legitimacy for judicial decisions; G. de Búrca, 'The Principle of Proportionality and its Application in EC Law', in (1993) 13 Yearbook of European Law 105–150.

predictability.²⁶³ Examination of a selection of well documented CJEU case law on proportionality will also reveal that there is a considerable variety in the degree of intensity and application by the CJEU of proportionality tests as well as differences in the amount of guidance it gives to the Member States in this context.

Section 4 introduces the development of the use of subsidiarity alongside proportionality in EU law-making in areas of shared competence. Here it is argued that despite subsidiarity being adopted as a formal constitutional principle to guide EU law-making in areas of shared competence, it is not a neutral arbiter between the EU level and national level, but inherently pushed towards a respect for local law-making and the legal regimes of the Member States. Secondly, it is argued that subsidiarity is an example of an essentially contested concept with reference to Gallie's theory of essentially contested concepts²⁶⁴ and that such conceptual dissonance has the potential to favour judicial discretion on how it is applied. This is related to the distinction drawn by Dworkin between rules and principles namely that rules are applicable in an all-or-nothing fashion whereas principles are 'a consideration including in one direction or another,' and thus principles have a dimension that rules do not. This is the dimension of weight or importance'.²⁶⁵ The issue addressed is to what extent subsidiarity can be related to rules or principles.

Section 5 argues that despite the principle of subsidiarity being a key constitutional concept alongside proportionality in EU law-making for mediating the balance of power between the EU and the Member States in areas of shared competence that the principle of subsidiarity is also an essentially contested concept using Gallie's theory of essentially contested concepts.²⁶⁶ Such conceptual dissonance, it will be argued, favours judicial discretion on how it

²⁶³ See further B.Tamanaha, B., *On the Rule of Law: History, Politics, Theory*, (Cambridge University Press, 2004).

²⁶⁴ W.B.Gallie, 'Essentially Contested Concepts', (1956) *Proceedings of the Aristotelian Society* 167-98.

²⁶⁵ R.Dworkin, 'The Model of Rules I', in: *idem*, *Taking Rights Seriously* (Harvard University Press Cambridge 1987) 14 at 25-26.

²⁶⁶ W.B.Gallie, 'Essentially Contested Concepts', (1956) *Proceedings of the Aristotelian Society* 167-98.

should be applied.²⁶⁷ Consequently, there is a compelling argument for judicial reasoning to engage more fully with how the CJEU should deal with such dissonance.

Section 6 concludes the chapter by further explaining how despite the essentially contested nature of subsidiarity following the Treaty of Lisbon there is a further renewed emphasis on the use of subsidiarity with its inherent respect for local law-making to guide the EU institutions when legislating in areas of shared competence. It will also explain how such a renewed emphasis is further supported by the introduction of a system of ex ante monitoring by the national Parliaments²⁶⁸ following the Treaty of Lisbon.²⁶⁹

2. Subsidiarity as a key constitutional principle for mediating the balance of power between the EU and the Member States

2.1 Introduction to subsidiarity

In the Treaty of Rome itself, there is no mention of the concept of subsidiarity. Nevertheless, as Douglas Scott has argued, there is some evidence that subsidiarity was operating within EU law.²⁷⁰ In particular, she argues that it could be seen in the approach of the CJEU and Commission to Article 28 TEC (now Article 34 TFEU). In addition, Douglas Scott has pointed out that this is implicit in the CJEU's interpretation of Article 28 TEC (now Article 34 TFEU) in the case of *Cassis de Dijon*²⁷¹ where the CJEU held that 'any product marketed in one

²⁶⁷ For further discussion on literature which highlights how disagreement and dissonance are present in the law more than judicial reasoning sometimes suggests and calls for judicial reasoning to engage more fully with such disagreement and dissonance see, for example, J.Waldron, *Law and Disagreement* (Oxford University Press, 1999), C.Finkelstein, 'Introduction to the Symposium on conflicts of Rights', (2001) 7(3) *Legal theory* 235-238; J.Waldron, 'Security and Liberty: The Image of balance', (2003) 11(2) *Journal of Political Philosophy* 191-210.

²⁶⁸ Article 12 (b) TEU provides that 'National Parliaments shall contribute actively to the good functioning of the Union [...] by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality. See also Article 7 of Protocol No 2 on the application of the principles of subsidiarity and proportionality.

²⁶⁹ For discussion of how it is been used see H.Brady, *The EU's Yellow Card Comes of Age* <<http://www.cer.org.uk/insights/eus-yellow-card-comes-age-subsidiarity-unbound>> accessed 13.1.14.

²⁷⁰ S.Douglas-Scott, *Constitutional Law of the EU*, (Longman, 2002) 176

²⁷¹ Case 120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649. See also S.Douglas-Scott, *Constitutional Law of the EU*, (Longman, 2002) 176 who argues that

Member State might be sold in any other, subject only to certain requirements which could be demonstrated to serve an objective public interest', i.e. mutual recognition.²⁷² Mutual recognition is more consistent with subsidiarity in that it allows for more diversity of national regulation. For, and as Douglas-Scott has argued, 'An alternative approach to free movement could have been the harmonisation of every last detail of product specification. However, this would not have accorded with subsidiarity and proportionality²⁷³ and would have led to the removal of much regional diversity'.²⁷⁴ Thus even at this early stage in the story of the emergence of subsidiarity in the EU, the EU was implicitly relying on subsidiarity as a way to respect cultural diversity of national rules in this context.

Other indications of the early use of the concept of subsidiarity in the EU context as a mechanism to regulate the competence of the then European Community are to be found in the Tindemans Report on the EU.²⁷⁵ This report had as one of its aims the encouragement of Member States to accept greater Community legislative action in order to promote European integration. Demirci suggests that, 'The core of the debate then was about finding a means of persuading the Member States to embrace more, not less, Community action rather than finding a basis for the allocation of powers between the Community and the Member States'.²⁷⁶

It is within this context that the subsequent Spinelli Initiative on European Union, which preceded the Maastricht Treaty, was produced. This called for reform of Community institutions to make such Community legislative action possible as a means of promoting the economic success of Europe: infused through the discussions leading up to the Spinelli Initiative was the issue of increasing the competence of the Community so that it could take more legislative action to

'although no specific mention of the word subsidiarity was to be found in the Treaties prior to Maastricht, subsidiarity was already operating within EEC law. For example, it could be seen in the approach of the CJEU and Commission to Article 28 TEC'.

²⁷² S.Douglas-Scott, *Constitutional Law of the EU*, (Longman, 2002) 176.

²⁷³ Ibid at 183 and who outlines that the principle of proportionality is a principle which has been linked to subsidiarity and has been roughly defined as the requirement of a 'reasonable relationship between an objective and the particular means used (be they legislative or administrative) to attain that objective'. See also G. de Búrca, 'The principle of proportionality and its application in EC law' (1993) YEL 105.

²⁷⁴ S.Douglas-Scott, *Constitutional Law of the EU*, (Longman, 2002) 176.

²⁷⁵ Report by Mr L.Tindemans to the European Council, Bulletin of the European Communities, Supplement 1.76.

²⁷⁶ B.Demirci, The principle of Subsidiarity in the EU Context – A thesis submitted to the Graduate School of Social Sciences of Middle East Technical University <<http://etd.lib.metu.edu.tr/upload/1074673/index.pdf>> last accessed 20.8.15 at 176.

promote European integration.²⁷⁷ Spinelli's initiative was put before the European Parliament. Their support for the initiative led to a draft EU Treaty being put forward in 1984. In particular, it provided that the EU was only to be given 'those powers required to complete successfully those tasks that they may carry out more satisfactorily than the States acting independently'.²⁷⁸ This version of subsidiarity was weighted in favour of the EU and clearly favoured centralization. As Spinelli explained, 'the transition from one sphere to the other is subject to the principle of subsidiarity in cases when an objective may be achieved more effectively in common...'²⁷⁹

However, the draft European Union Treaty received little support and the subsidiarity principle was put to one side while the EU institutions focused on the enacting of the Single European Act in 1986.²⁸⁰ There was only one indication of subsidiarity in the SEA and that was in respect of where the Community was to take action in respect of the environment.²⁸¹ It was not until President Delors promoted subsidiarity as a useful mechanism to provide a constraint on EU law making that discussions on subsidiarity started to assume a much greater prominence in reassuring politicians concerned about the increase in European powers at the expense of national powers.²⁸² However, at this stage of discussion there was little idea of how the nebulous concept of subsidiarity would be used in practice as a safeguard to protect national interests in EU law-making in areas of shared competence. In order to try and flesh out how subsidiarity would be used to safeguard of national interests the European Commission issued a report in 1992 which highlighted the importance of subsidiarity as a safeguard for national powers and how subsidiarity could be used in EU law-making in areas of shared competence. So, for example, it stated that 'national powers are the rule and the Community's the exception'.²⁸³ It also proposed that each proposal for Community action should be justified using subsidiarity²⁸⁴ as well as later

²⁷⁷ Demirci Op.Cit at 35.

²⁷⁸ Article 12 of the Draft European Union Treaty (1984) OJ C77/33

²⁷⁹ A.Spinelli, *Towards the European Union* (1983) 19.

²⁸⁰ Single European Act, 169/1 (1987) [1987] 2 CMLR 741.

²⁸¹ Art 130r (4) Single European Act, 169/1 (1987) [1987] 2 CMLR 741.

²⁸² S.Vanhoonacker, *The European Parliament and European Political Union*, in *The Intergovernmental Conference on Political Union* (Finn Laursen and S. Vanhnhacker eds, 1992) 215.

²⁸³ Commission of the European Communities, 'The Subsidiarity Principle', (1992) 25 (10/92) EC Bull. at 116.

²⁸⁴ Ibid at 117.

presenting to the European Council in 1992 a list of EU legislation already in force that did not comply with subsidiarity.²⁸⁵

There was also an earlier draft of the TEU which included that subsidiarity could be used as a formal legal mechanism in EU law-making in areas of shared competence to protect national interests is evident.²⁸⁶ In particular, this provided that, ‘Where this Treaty confers concurrent competence on the Union, the Member States shall continue to act so long as the Union has not legislated.’²⁸⁷ The Union shall only act to carry out those tasks which may be undertaken more effectively in common than by the member states acting separately, in particular those whose execution requires action by the Union because their dimension or effects extend beyond national frontiers’.

It was not until the adoption of the Maastricht Treaty that subsidiarity was detached from its historical origins discussed next and formally adopted as a constitutional principle to guide the exercise of competence of the EU in shared policy areas in Article 5 TEC. The current legal rules of principles are located in Article 5(3) TEU.²⁸⁸

Thus in EU law, subsidiarity is a key constitutional principle and rule alongside proportionality²⁸⁹ for mediating the balance of power between the EU and the Member States in the context of the development of EU law and the European integration process.²⁹⁰

²⁸⁵ The European Council, Conclusions of the December 11-12 1992 Edinburgh Summit part A annex 2.

²⁸⁶ Article 12(2) of The Draft Treaty establishing the EU in Bulletin of the EC Feb (1984) No 2 pp 8-26.

²⁸⁷ This has now been adopted with the definition of shared competences under Article 5 Lisbon.

²⁸⁸ See also the Protocol on the Application of the Principles of Subsidiarity and Proportionality [1997] OJ C 340/105.

²⁸⁹ Article 5 (3) TEU, in conjunction with the Protocol on subsidiarity and proportionality See also the Protocol on the application of the principles of subsidiarity and proportionality, Consolidated Texts of the EU Treaties as amended by the Lisbon Treaty, pages 204 to 207 (Cm 7310) and House of Commons European Scrutiny Committee ‘Subsidiarity, National Parliaments and the Lisbon Treaty’ Thirty-third Report of Session 2007–08 <<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/563/563.pdf>> last accessed 12.7.12. for a discussion of this Protocol..

²⁹⁰ For a general discussion of both the theoretical and the legal dimension of European legal integration, see for example K.A. Armstrong, (1998) ‘Legal Integration: Theorizing the Legal Dimension of European Integration’, 36(2) Journal of Common Market Studies, 155-174; J.Bengoetxea, N.MacCormick, and L. Moral Soriano, (2001) ‘Integration and Integrity in the Legal Reasoning of the European Court of Justice’ in G.de Búrca and J.H.H.Weiler, (eds) *The European Court of Justice* (Oxford: Oxford University Press), pp. 43- 86; M. Cappelletti, M.Seccombe, J.H.H. Weiler, (1985) *Integration through Law: European and the American*

Subsidiarity as a principle in EU law has featured in academic literature from both from a legal and an economic perspective. From an economic perspective, Pelkmans has pointed out, economists have enjoyed a ‘long tradition in studying subsidiarity as a functional principle’²⁹¹ and have welcomed the principle as a useful one in determining what is best in terms of the overall welfare of a particular federal body in a multi-tier setting.²⁹² For, as Pelkmans points out, not only is it a useful principle in helping to limit centralisation it is also useful for justifying internal market intervention to Member States.²⁹³ So, for example in the EU context, where there has been discussion of subsidiarity from an economic perspective, the advantages of the use of such a concept in EU integration in respect of determining the best level of government for particular economic functions and enhancing and promoting the market has been emphasised.²⁹⁴

On the other hand, subsidiarity has been approached from a legal perspective in the academic literature regarding the use of subsidiarity in EU law-making in areas of shared competence. A common theme running through this literature is the considerable criticism voiced about the difficulties of operationalising subsidiarity from a legal perspective. For example, Dehousse argues that subsidiarity is ‘ill-adapted to the problems it is meant to solve.’ Furthermore, he argues, ‘as a general guideline in favour of decentralisation ... its direct utility as a legal instrument is limited’.²⁹⁵ It is the legal perspective of subsidiarity in EU law-making and the difficulties for the CJEU of operationalising subsidiarity in

Federal Experience: Vol 1: Methods, Tools and Institutions (Berlin/New York: Walter de Gruyter) 86. G.Marks, LHooghe and K.Blank, *Integration Theory, Subsidiarity and the Internationalisation of Issues: the Implications for legitimacy*, EU1 working Paper RSC, 95/7 (European Union Institute, Florence, 1995); Ran Hirschl, *Hegemonic Preservation in Action? Assessing the Political Origins of the EU Constitution*, in Weiler and Eisgruber, eds., *Altneuland: The EU Constitution in a Contextual Perspective*, Jean Monnet Working Paper 5/04 <<http://centers.law.nyu.edu/jeanmonnet/archive/papers/04/040501-05.pdf>> 16.7.12 at 3.

²⁹¹ J.Pelkmans, ‘Testing for Subsidiarity’ Bruges European Economic Policy Briefings No 13 <<http://www.coleurop.be/eco/publications.htm>> accessed 12.7.12. The focus of this chapter is on a legal approach to subsidiarity in EU law making but for an economic approach to subsidiarity in EU law see for example Eugene D. Cross, ‘Pre-Emption of Member State Law in the European Economic Community: A Framework for Analysis’, (1992) 29 *Common Market Law Review* 447.

²⁹² J.Pelkmans, ‘Testing for Subsidiarity’ Bruges European Economic Policy Briefings No 13 <<http://www.coleurop.be/eco/publications.htm>> accessed 12.7.12. at 1. See also at 3 where Pelkmans writes that ‘the principle is welcomed in economics as a useful basis for the optimal assignment of powers to different tiers of government in the multi-tier Union.

²⁹³ *Ibid* at 40.

²⁹⁴ Eugene D. Cross, ‘Pre-Emption of Member State Law in the European Economic Community: A Framework for Analysis’, (1992) 29 *Common Market Law Review* 447.

²⁹⁵ R.Dehousse, *Does subsidiarity really matter?* (1992) Florence, European University Institute, EUI Working Paper Law no. 92/32 at 28.

its reasoning in areas of shared policy in particular that will be the focus of this thesis.²⁹⁶

The next section considers the adoption of subsidiarity as a legal and constitutional principle by the EU to limit unnecessary EU intervention. It also explains how the rhetoric accompanying the introduction of this principle into EU law was primarily focused on the symbolism of such a principle rather than its use in practice. This, it will be argued in the next section, is problematic when it comes to operationalizing subsidiarity on account of the two opposing aims underpinning the use of EU subsidiarity in areas of shared competence: on the one hand a push towards centralisation and on the other hand respecting localism.

2.2 The adoption of subsidiarity as a legal and constitutional principle by the EU to limit unnecessary EU intervention

The way the EU introduced the concept of subsidiarity in the Maastricht Treaty as a legal and constitutional principle to limit unnecessary EU intervention reflected a compromise between various competing interests of the principal actors involved in the creation of the internal market. The competing interests are highlighted by Kersbergen and Verbeek as firstly the UK's concerns about EU legislation eroding the national sovereignty of UK Parliament.²⁹⁷ Secondly, concerns which were raised by the German Federal government that an increase of European powers would diminish German regional competence²⁹⁸ as well as calls by the German Länder for the inclusion of subsidiarity in the Maastricht Treaty.²⁹⁹ Finally the EU Commission's interest in reducing the impression that the EU's 1992 programme 'would lead to ever growing power-wielding by Brussels'.³⁰⁰

²⁹⁶ For examples of other academic criticism of the use of subsidiarity in EU law making see G.Davies, 'Subsidiarity: the Wrong Idea, in the Wrong Place at the Wrong Time', (2006) 43 CML Rev 63.

²⁹⁷ K.Kersbergen and B.Verbeek, 'The Politics of Subsidiarity in the European Union', (1994) 32 Journal of Common Market Studies at 220.

²⁹⁸ Ibid.

²⁹⁹ M.Suszycka-Jasch and H.Jasch, 'The Participation of the German Lander in the formulation of German EU-policy', (2009) 10(9) German Law Journal 1215 -1256 at 1238.

³⁰⁰ Ibid.

The concept of subsidiarity was given legal effect in the EU initially by the Treaty of Maastricht in 1992 in Article 3b.³⁰¹ Article 3b read as follows;

‘The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty’.

Thus this latter article provided that subsidiarity is to be used as a rule to regulate EU law making in areas where the EU shares competence with the Member States.

However, subsidiarity in that article itself was not defined. Furthermore, the principle of subsidiarity has moved away from being a principle of social organisation ‘to an explicitly political rule of institutional design through German federalist thought’³⁰² and a constitutional and legal principle rule in EU law to limit unnecessary EU intervention.

Examination of the wording of the aforementioned provisions further reveals that there was no reference to either the social or political theoretical basis of this concept or to the ‘deepest foundation of the doctrine of subsidiarity’ that Carozzo has argued underpins the concept of subsidiarity. Indeed reference to subsidiarity’s key theoretical foundations as a principle of social organisation is conspicuous by its absence from the EU’s concept of subsidiarity in Article 5 TEU (ex Article 5 TEC). Academic debate is also rather reticent from a philosophical perspective of the EU’s version of subsidiarity and the dangers of the conceptual discontinuity that arises from having a concept which has two opposing aims: on the one hand a push towards centralisation and, on the other

³⁰¹ Text in Full of the Treaty on European Union," *Agence Europe* (Documents) No. 1759/60, 7 February 1992. Subsidiarity is currently located in Article 5 TEU

³⁰² P.G.Carozza ‘Subsidiarity as a structural principle of international human rights law’ (2003) 97 *The American Journal of International law* 38-79 at 44.

hand, respecting localism.³⁰³ Instead, academic debate tends to focus on the problematic parts of subsidiarity rather than its potential to be more fully realised perhaps on account of subsidiarity in EU law having a Eurosceptic connotation and pro-integration bias.³⁰⁴ So, for example, academic commentary has considered the extent to which subsidiarity could be used to restrain the EU law-making institutions³⁰⁵ as well as considering the extent to which subsidiarity is subject to judicial review.³⁰⁶

On the other hand, subsidiarity has been adopted as a guide to EU law-making in shared areas on account of its inherent respect for local law-making even though subsidiarity can also be utilised to push centralisation.³⁰⁷ Where subsidiarity is promoted as encompassing an emphasis on a respect for decision making being at national level when law-making in shared policy areas, this is respectful of the accountability of national governments, the latter being best placed to gauge the will of the electorate³⁰⁸ and best placed to adjust law and policy according to the particular cultural conditions in a particular Member State at any point in time.³⁰⁹ Thus subsidiarity encompassing a respect for local law-making by the EU in turn enables particular Member States to retain a legal regime that reflects their particular socio-cultural conditions³¹⁰ It also respects what Weiler describes as the people of a particular national state and its ‘demos’. The latter he argues is a manifestation of various elements such as ‘the common history, common cultural habits and sensibilities...’.³¹¹ Furthermore, the individual is most fully represented politically in a polity marked by a demos, and as the EU lacks a demos this adds further weight to the argument that it is the national governments that are best placed to gauge the will of the electorate. It makes it easier for the Member State to accept supremacy.

³⁰³ See J.Crosthwaite, ‘Subsidiarity and Philosophy’, (1993) 5 *Philosophy Now* at 24.

³⁰⁴ See for egs M.Kumm, (2006) ‘Constitutionalising subsidiarity in Integrated Markets: the Case of Tobacco Regulation in the European Union’ (12(4) *ELJ* 503-533

³⁰⁵ A.Toth, ‘Is Subsidiarity Justiciable (1994) 19 (3) *European Law Review* 268.

³⁰⁶ See further De Búrca, G, ‘The Principle of Subsidiarity and the Court of Justice as an Institutional Actor’ (1998) 36(2) *Journal of Common Market Studies*, 217-235. This will be considered further in chapter 3.

³⁰⁷ G.Berman, ‘Taking Subsidiarity Seriously: Federalism in the European Community and the United States,’ (1994) 94 (2) *Columbia Law Review* 339-344.

³⁰⁸ *Ibid* at 339-341.

³⁰⁹ *Ibid* 341.

³¹⁰ *Ibid*.

³¹¹ JHH. Weiler, ‘The State “über alles”; *Demos*, *Telos*, and the German Maastricht Decision’, *NYU Jean Monnet Working Paper No. 6/1995* (1995) at 3.

Thus this section has explained the adoption by the EU of subsidiarity as a legal and constitutional principle by the EU to limit unnecessary EU intervention.

The next section turns to consider the principle of proportionality which has later become an aspect of subsidiarity applied to competences in EU law.³¹² This provides a prelude to a later section which will look at specific applications of the principle of subsidiarity and theories by Kumm and Davies of how it can be specifically (or not) applied. For, although the rhetoric of subsidiarity as a key constitutional legal principle and rule is widely accepted, its operationalisation in conjunction with the principle of proportionality is much more contested.

3. Proportionality as a widely recognised concept used as a test in judicial review

3.1 Introduction

This section introduces the concept of proportionality in EU law which, like subsidiarity in EU law, is about the appropriate means to achieve a need. It also explains how unlike subsidiarity, proportionality in EU law is concerned with how competence is exercised rather than the EU legislative institutional process of determining the level for exercise of competence. A key purpose of the section is to explain how despite proportionality becoming a recognised principle of law that there are differing levels of intensity of judicial review by the CJEU of national restrictions in light of the proportionality principle depending on the type of case being considered.³¹³

Adopting a doctrinal perspective, the section commences in 3.2 with a consideration of how proportionality is a widely recognised concept used as a test in judicial review of public acts at national level. This discussion is also contextualised by reference to wider literature by Elliott which emphasises how at national level ‘public law is increasingly about the enforcement of a culture of justification’ on account of ‘the ultra vires doctrine [which] has always called for exercises of administrative authority to be justified by reference to positive

³¹² See M.Kumm, ‘Constitutionalising subsidiarity in Integrated Markets: the Case of Tobacco Regulation in the European Union,’ (2006) 12(4) ELJ 503-533. See also the Lisbon Treaty which has focused attention on subsidiarity and proportionality through the Protocol.

³¹³ T.Tridimas, *The General Principles of EC Law* (2006, 2nd ed., Oxford, OUP) 66.

law’.³¹⁴ Section 3.3 then considers some examples of differing interpretations of the operationalization of proportionality. Section 3.4 reviews the use of proportionality in EU law by the CJEU to illustrate how there are differing levels of intensity of judicial review by the CJEU of national restrictions in light of the proportionality principle depending on the type of case being considered.³¹⁵

3.2 Proportionality as a widely recognised concept used as a test in judicial review of public acts at national level

Proportionality, Möller argues, ‘is a doctrinal tool for the resolution of conflicts between a right and a competing right or interest at the core of which is the balancing stage which requires the right to be balanced against the competing right or interest’³¹⁶ and that ‘this conflict is ultimately resolved at the balancing stage’.³¹⁷ Although he acknowledges that there are differing ways in which the proportionality principle has been expressed by courts in constitutional rights law,³¹⁸ the widely accepted view is that the ultimate resolution of the conflict at the balancing test is preceded by the court ‘establish[ing] that there exists a genuine conflict (suitability) between the right and a relevant (legitimate) competing interest (legitimate goal) which cannot be resolved in a less restrictive way (necessity)’.³¹⁹ Each stage, he argues, raises particular questions. So, for example, in respect of establishing whether there is a legitimate goal the primary focus of a court is to consider ‘whether a policy or decision is objectively justifiable, not whether the persons who made it had the right considerations on their minds’.³²⁰ Once it is established that there is a legitimate goal for a particular policy he explains that a court necessarily goes on to consider ‘if the interference

³¹⁴ M. Elliott, ‘Justification, Calibration and Substantive Judicial Review: Putting Doctrine in its Place’ UK Const. L. Blog (17th September 2013) < <http://ukconstitutionallaw.org>>accessed 13.6.14.

See also A. Barak, *Proportionality: Constitutional Rights and Their Limitations*, (CUP, 2012) at 227 for a discussion of how the rule of law is one of the reasons for considering proportionality as a proper criterion for the constitutionality of the Constitution of the federal Republic of Germany.

³¹⁵ T.Tridimas, *The General Principles of EC Law* (2006, 2nd ed., Oxford, OUP) 66.

³¹⁶ K.I.Möller, ‘Proportionality: Challenging the Critics’, (2012) 10(3) International Journal of Constitutional Law 709 at 710.

³¹⁷ K.I.Möller, ‘Proportionality: Challenging the Critics’, (2012) 10(3) International Journal of Constitutional Law 709 at 711.

³¹⁸ Ibid at 709. For other examples of formulations see further G.Huscroft, B.Miller and G.Webber, *Proportionality and the Rule of Law, Rights, Justification, Reasoning* (CUP, 2014) at 3.

³¹⁹ K.I.Möller, ‘Proportionality: Challenging the Critics’, (2012) 10(3) International Journal of Constitutional Law 709.

³²⁰ Ibid at 712.

contributes to the achievement of the goal to some extent, however small, then the suitability test is satisfied because it has been established that there is indeed a clash of the two values'.³²¹ The third stage, he argues, focuses on establishing that 'there must be no other, less restrictive policy that achieves the legitimate goal equally well',³²² although he does acknowledge that such a test can be problematic where the less restrictive policy requires more resources or finances.³²³ Finally, he explains how the most problematic stage is that of the balancing stage which necessitates 'a moral argument as to which of the competing interests takes priority in the case at hand' which in the constitutional context requires 'balancing all the relevant considerations',³²⁴ and determining 'the sacrifice that can legitimately be demanded from one person for the benefit of another person or the public'.³²⁵ This is most problematic because it seems to involve the greatest degree of discretion – a substantive policy choice by the judiciary over which of the two competing interests is more desirable. Thus, as Huscroft, Miller and Webber argue 'what the principle of proportionality does promise is a common analytical framework, the significance of which is not in its ubiquity, but in how its structure influences (some would say controls) how courts reason to conclusions in many of the great moral and political controversies confronting political communities'.³²⁶

As proportionality is a widely recognised and frequently used concept in judicial review of public acts at national level,³²⁷ it consequently has close links in the literature with wider debates on the importance of justifying the exercise of governmental authority to legal authority in order to reflect and evidence an adherence to the rule of law.³²⁸ In respect of the latter and more recently in the light of increasing legal requirements imposed on governments Elliott argues there has been an increase of what is expected of government authorities when exercising governmental power. In particular, and as Elliott highlights, for

³²¹ Ibid at 713,

³²² Ibid 713.

³²³ Ibid 714.

³²⁴ Ibid 716.

³²⁵ Ibid 716.

³²⁶ G.Huscroft, B.Miller and G.Webber, *Proportionality and the Rule of Law, Rights, Justification, Reasoning* (CUP, 2014) at 3.

³²⁷ The concept of proportionality also has doctrinal importance as a key feature of global constitutionalism. For further discussion see David Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652 (2005) coins this as a term for generic constitutional law. See also See M.Klatt and M.Meister, *The Constitutional Structure of Proportionality*, (2012, OUP).

³²⁸ B.Tamanaha, B, *On the Rule of Law: History, Politics, Theory*, (Cambridge University Press, 2004)

government authorities ‘what the law requires is taken to have become increasingly demanding.’³²⁹

Proportionality and its links with the wider debates on the importance of justifying the exercise of power has particular importance when considering how judges review the exercise of governmental authority which impacts on the rights of the legitimate expectations of the individual as ‘the sufficiency of any justification may fall to be assessed against additional, more demanding criteria.’³³⁰ This, Elliott argues requires courts when reviewing the exercise of governmental authority to be clear about firstly that,

‘that it too would have proceeded in the way that the administrator did. Second, even once the issue of the standard of justification, or review has been settled, questions will arise about whether that standard has been met- which, in turn, triggers questions about the court’s role in evaluating the quality of any justifications offered by the decision-maker.’³³¹

To achieve such a structured approach when reviewing the exercise of governmental authority, Elliott proposes that the court should focus on two distinct questions. Firstly ‘to determine what should constitute the operative standard of justification in the particular circumstances of the case. What, in other words, should be the justificatory burden under which the decision-maker is placed, and which will have to be discharged if the decision is to be found by the reviewing court to be lawful?’³³²

Secondly, Elliott explains how the court needs to consider the rationality of the decision with reference to whether a fair balance has been struck between conflicting interests. This question he accepts ‘reduces, at least to some extent, to a value judgement, the acceptability of the balance struck between two incommensurable variables being impossible to determine unless those variables are first invested with values that are inherently contestable’.³³³ The debate about legitimacy centres on this: why should the judiciary be making alternative policy choices to the executive/legislature here? i.e. between incommensurable values. A

³²⁹ M. Elliott, ‘Justification, Calibration and Substantive Judicial Review: Putting Doctrine in its Place’ UK Const. L. Blog (17th September 2013) < <http://ukconstitutionallaw.org>>accessed 13.6.14.

³³⁰ Ibid.

³³¹ Ibid.

³³² Ibid.

³³³ Ibid.

common theme highlighted in the literature concerning the use of proportionality by judges is on account of judges having to strike a balance between two incommensurable variables. So, for example as Endicott explains, ‘The incommensurability problem: if there is no rational basis for deciding one way rather than the other, then the result seems to represent a departure from the rule of law, in favour of arbitrary rule by judges’.³³⁴ Barak, however, has sought to defend the use of proportionality by arguing,

‘ that it is a common base for comparison, namely the social marginal importance and that the balancing rules—basic, principled, concrete—supply a rational basis for balancing. A democracy must entrust the judiciary—the unelected independent judiciary—to be the final decision-maker—subject to constitutional amendments—about proper ends that cannot be achieved because they are not proportionality *stricto sensu*’.³³⁵

Thus Barak argues that as there is a common base for comparison and a structured approach to balancing that the judiciary must be allowed to make the final decision here. Citing the example of a judge deciding a case weighing up the right to family life against a country’s right to control immigration, he argues that both options are socially important and therefore the judge can decide which way the case should be decided as there is a single criterion here.³³⁶ The single criterion he outlines refers to, ‘the relative social importance attached to each of the conflicting principle or interest at the point of conflict, which assesses the importance to society of the benefits gained by realisation of the law’s goals as opposed to the importance of society of preventing the limitations of human rights’.³³⁷

On the other hand, Endicott points out,

‘identifying a single criterion does not eliminate incommensurability if the application of the criterion depends on considerations that are themselves incommensurable. If we are trying to decide whether to go to a restaurant with excellent food that is expensive, or a restaurant with less-than-

³³⁴ T.Endicott, ‘Proportionality and Incommensurability’, in G.Huscraftm B. Miller and G.Webber (eds) *Proportionality and the Rule of Law, Rights, Justification, Reasoning*, (Cambridge University Press, 2014) 317.

³³⁵ A.Barak, ‘Proportionality and Principled Balancing’, (2010) 4 *Law and Ethics of Human Rights* 15-16.

³³⁶ *Ibid* at 7.

³³⁷ *Ibid* 7 and 8.

excellent food that is cheaper, you would be right to say that there is a common base for comparison (we could call it preferability); and you would be right to insist that there may be rational ground for judging that one restaurant is preferable to another (because, for example, there can be definite reason to choose a much-less-expensive restaurant where the food is almost as good) But you would have no reason to claim that the considerations that determine which restaurant is preferable are commensurable, and no reason to think that, for every pair of alternatives, there is determinate reason in favour of one choice between the two. In human rights cases, the availability of the covering value, importance does not give us any reason to think that the grounds on which judgements are to be made are commensurable. Major incommensurabilities need to be resolved in order to make the judgement that Barak recommends as to whether it is more socially important to interfere with family life (or freedom of speech or of religion) in a particular way, or more socially important not to do so'.³³⁸

Other literature too has focused on whether proportionality as a concept is a normatively desirable one in the context of the relationship between the state and the individual at national level. In particular, the concept has been interpreted in different ways on account of the existence of different theories of rights regimes: for example, Alexy has argued that proportionality is a tool to balance individual/group interests against the public interest of the state.³³⁹ Furthermore, he argues, 'the principle of proportionality in its narrow sense follows from the fact that principles are optimization requirements relative to what is legally possible. The principles of necessity and suitability follow from the nature of principles as optimization requirements to what is factually possible'.³⁴⁰ In a recent article Alexy further points out that there is a distinction between formal principles, such as legal certainty, and substantive principles, such as justice, and how there are cases 'in which a formal principle can and even must, be balanced

³³⁸ T.Endicott, 'Proportionality and Incommensurability', in G.Huscraftm B. Miller and G.Webber (eds) *Proportionality and the Rule of Law, Rights, Justification, Reasoning*, (Cambridge University Press, 2014) 318.

³³⁹ See also A.Stone Sweet and J.Mathews, *Proportionality Balancing and Global Constitutionalism*, (2008) *Columbia Journal of Transnational Law* 76 at 93

³⁴⁰ R.Alexy, *A Theory of Constitutional Rights*, (New York: Oxford University Press, 2002) 67.

against a substantive principle'.³⁴¹ Such balancing exercises, he concludes, 'have been dealt with in the past in Germany after the collapse of the German Democratic Republic 1989 by applying the Radbruch formula of 'extreme injustice is no law'.³⁴² Such a formula he points out 'is the result of balancing the substantive principle of justice against the formal principle of legal certainty', and that 'according to the law of colliding principles, the consequence of the procedure of the principle of justice over the principle of legal certainty under the conditions of extreme injustice is that under this condition the consequences required by the prevailing principle of justice applies and this is exactly what the Radbruch formula³⁴³ states.'³⁴⁴ Thus the use of such a formula involves giving a higher concrete weight to justice than to certainty in situations which involve extreme injustice.

Dworkin, on the other hand, has argued that such balancing should not be utilised in the context of limiting rights.³⁴⁵ As he writes, 'if someone has the right to do something then it is wrong for the government to deny it to him even though it would be in the general interest to do so'.³⁴⁶ Habermas too argues that balancing is difficult as 'because there are not rational standards here, weighing takes place either arbitrarily or unreflectively, according to customary standards and hierarchies'.³⁴⁷

Thus this section has explained how proportionality has been argued to be 'a doctrinal tool for the resolution of conflicts between a right and a competing right or interest at the core of which is the balancing stage which requires the right to be balanced against the competing right or interest'³⁴⁸ and that 'this conflict is ultimately resolved at the balancing stage'.³⁴⁹ This has included discussion of literature which has highlighted the difficulties of the use of proportionality by the

³⁴¹ R. Alexy, 'Formal principles: Some Replies to the Critics', (2014) 12(3) *International Journal of Constitutional Law* 511-524 at 517-8.

³⁴² Ibid.

³⁴³ G.Radbruch, *Statutory Lawlessness and Supra-Statutory Law*, (translated by B.Litschewski Paulson and S. L Paulson) in (2006) 26(1) *Oxford Journal of Legal Studies* 1-11.

³⁴⁴ Ibid

³⁴⁵ R.Dworkin, *Taking Rights Seriously*, (1987) at 269. See also R.Dworkin, 'Social rules and legal theory', (1972) 81 *Yale Law Journal* 855-890.

³⁴⁶ Ibid.

³⁴⁷ J.Habermas, *Between Facts and Norms*, (1996, Trans. W.Rehg., Cambridge: Polity) at 259.

³⁴⁸ K.Möller, 'Proportionality: Challenging the Critics', (2012) 10(3) *International Journal of Constitutional Law* 709 at 710.

³⁴⁹ Ibid at 711.

judges when having to strike a balance between two incommensurable variables. It has also explained how proportionality is a widely recognised concept (as discussed next) used as a test in judicial review of public acts at national level.³⁵⁰ Such discussion was contextualised by reference to wider literature by Elliott which emphasises how at national level ‘public law is increasingly about the enforcement of a culture of justification’ on account of ‘the ultra vires doctrine [which] has always called for exercises of administrative authority to be justified by reference to positive law’.³⁵¹ With this literature in mind the next section considers and critiques some examples of differing interpretations of the operationalization of proportionality in the use of balancing individual/group interests against the public interest.

3.3 Differing interpretations of the operationalization of proportionality

Proportionality has been said to encompass the notion that ‘if you pursue an end, you must use a means that is helpful, necessary and appropriate’.³⁵² It has been proposed that it is a ‘test to determine whether an interference with a prima facie right is justified’.³⁵³ The origins of the use of a concept of proportionality as encompassing the notion that ‘more than enough is out of proportion’³⁵⁴ are old.³⁵⁵ So, for example, proportionality has been used in the context of exercise of administrative powers in nineteenth century administrative law of Prussia³⁵⁶ and, in particular, the Prussian Supreme Administrative Court. In the case of *Kreutzberg*, for example, the Prussian Supreme Administrative Court ruled that

³⁵⁰ See s.3.2 for discussion of case examples.

³⁵¹ M. Elliott, ‘Justification, Calibration and Substantive Judicial Review: Putting Doctrine in its Place’ UK Const. L. Blog (17th September 2013) < <http://ukconstitutionallaw.org> > accessed 13.6.14.

See also A. Barak, *Proportionality: Constitutional Rights and Their Limitations*, (CUP, 2012) at 227 for a discussion of how the rule of law is one of the reasons for considering proportionality as a proper criterion for the constitutionality of the Constitution of the federal Republic of Germany.

³⁵² B.Schlink, ‘Proportionality in Constitutional Law: why everywhere but here’, (2012) 22 *Duke Journal of comparative and International Law* 291 at 292.

³⁵³ K.Möller, ‘Proportionality: Challenging the Critics’, (2012) 10(3) *International Journal of Constitutional Law* 709 at 710.

³⁵⁴ B.Schlink, ‘Proportionality in Constitutional Law: why everywhere but here’, (2012) 22 *Duke Journal of comparative and International Law* 291 at 292

³⁵⁵ See Aristotle, *Nicomachean Ethics Book V* which refers to the idea of justice as proportionality.

³⁵⁶ See Article 10 (2) *Allgemeines Landrecht*, (1794) for an early example of a proportionality requirement and a discussion of this by I.Porat and M.Cohen-Eliya, ‘American Balancing and German Proportionality: The Historical Origins’, (2013) 11 (4) *International Journal of Constitutional Law*.

the police should only employ such measures as are necessary for the maintenance of public order.³⁵⁷

Following the Second World War, in Germany, the later established Federal Constitutional Court of Germany also made further use of proportionality when reviewing administrative action of the German authorities in light of the German constitution which has a Bill of Rights enshrining a variety of individual rights.³⁵⁸ But the same German constitution also permits administrative action which has the potential to limit these rights. Consequently, the German Constitutional Court has been faced with two potentially conflicting principles that are both enshrined in the German Constitution. It is within the context of the German Constitutional Court being faced with such a conflict that they have relied on proportionality in that any German legislation that is brought in must be the minimum necessary to achieve the result.³⁵⁹ As Takahashi explains,

‘the legitimacy of proportionality is derived from the requirement to protect citizens’ basic rights, one of the underlying constitutional values. The BVerfG has recognised proportionality as a constitutional principle on the basis of the principle of Rechtsstaat (rule of law or constitutional state) and the essence of the fundamental rights themselves. First, while requiring the legitimacy of all the state’s actions to be compatible with the constitution, Rechtsstaat is designed to protect citizens’ rights against interference by powerful state authorities. Secondly, the concept of human dignity enunciated in Art 1(1) G and the right to the free development of the individual guaranteed in Article 2(1) GG preordain that citizens can enjoy the maximum freedom of action.’³⁶⁰

The framework for the application of the proportionality test is considered by Cohn who explains how the German Constitutional Court has adopted a three pronged test.

³⁵⁷ Y.Takahashi, ‘Proportionality – A German approach’, (1999) 19 *Amicus Curiae* at 11 citing Decisions of the Prussians Administrative Law Court, 9 (1882) 353 at 366.

³⁵⁸ For further discussion of this see Y.Takahashi, Proportionality – ‘A German approach’, (1999) 19 *Amicus Curiae* at 11.

³⁵⁹ See for example *Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court]* June 11, 1958, 7

ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 377 where the German Constitutional Court had to consider on the one hand German constitutional protection of an individual’s freedom to choose and practise a profession and the legislature’s power to limit that freedom.

³⁶⁰ Takahashi, Proportionality – A German approach, (1999) 19 *Amicus Curiae* at 11.

‘Firstly the measure must be suitable for the achievement of the aim pursued. Secondly, no other milder means could have been employed to achieve that aim (a necessity tool). Thirdly, under a proportionality *stricto sensu* test, a type of cost-benefit analysis is required for the measure to be upheld. The benefit at large must outweigh the injury to the implicated individual’.³⁶¹

It is the latter test, Cohn argues, is concerned with balancing which is ‘the main metaphor to explain what judges do when they rule upon the proportionality of a constitutional act’.³⁶² However, balancing is also the most problematic part of the proportionality test in that such judicial balancing not only empowers judges in respect of judicial review of administrative action, it also runs the risk of leading to subjectivity in judicial reasoning on account of the fact that when judges adopt a balancing approach, this does not necessarily provide a consistent approach of how the interests are to be weighted.³⁶³ The problem of incommensurability of proportionality has been the subject of critique on the grounds that proportionality can be subjective when incommensurable values are to be pitted against another as discussed above. For example, Möller considers this and points out that such criticisms focus on the argument ‘that proportionality analysis is not morally neutral or that balancing can or should always be conducted in a cost-benefit fashion.’³⁶⁴

On the other hand, despite the criticism of the use of proportionality, the use of proportionality conceptually has been popular as a way of encompassing the notion that any legislation must be the minimum necessary to achieve a result in the context of the relationship between the state and the individual³⁶⁵ i.e. so the necessity element is less controversial. It has been used in a number of different ways and in a variety of legal contexts. So, for example, proportionality is a key

³⁶¹ M.Cohn, ‘Three Aspects of Proportionality’, (2012) Paper presented at VII World Congress of the International Association of Constitutional Law, Mexico City, workshop 9 at 4.

³⁶² *Ibid* at 16.

³⁶³ See further B.Schlink, ‘Proportionality in Constitutional Law: why everywhere but here’, (2012) 22 *Duke Journal of Comparative and International Law* 291 at 299 for a detailed discussion of the problems of proportionality. For a jurisprudential discussion of judicial balancing see T.A.Aleinikoff, ‘Constitutional Law in the Age of Balancing’ (1987) *Yale Law Journal* 943. For a discussion of the difficulty of balancing interests see S.Tsakyrakis, ‘An Assault on Human Rights?’, (2010) 7 *International Journal of constitutional Law*.

³⁶⁴ K. Möller, ‘Proportionality: Challenging the critics, (2012) 10 (3) *International Journal of Constitutional Law* 709-731 at 730.

³⁶⁵ *Ibid* and who argues at 731 that there has been a ‘spectacular success of the principle of proportionality in constitutional rights adjudication around the world’.

concept utilised by the European Court of Human Rights.³⁶⁶ It is frequently evidenced in practice in the case law of the ECHR where the Court of Human Rights has sought to balance Convention rights with legitimate governmental concerns and the existence of a margin of appreciation³⁶⁷ that states retain when legislating for legitimate concerns.³⁶⁸ So, for example, in the case of *Sporrong and Lönnroth v Sweden* it emphasised in its ruling that even where contracting states enjoy a wide margin of appreciation in the context of implementation of their town-planning policy, 'the Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1.'³⁶⁹

In the UK the principle of proportionality post the Human Rights Act 1998 is also now recognised by the House of Lords and Supreme Court as a principle of UK public law but only (usually) when applying the Human Rights Act.³⁷⁰ However, as Hick points out, although,

³⁶⁶ J. McBride 'Proportionality and the European Convention on Human Rights', in *The Principle of Proportionality in the Laws of Europe*, E.Ellis (ed) (1999, Hart) 24.

³⁶⁷ For a definition of margin of appreciation see further *Handyside v. The United Kingdom*, [1976] ECHR 5 (7 December 1976) paras 48-49 where the European Court of Human rights defined the margin of appreciation in the context of Article 10 as follows:- 'Article 10 para. 2 (art. 10-2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force (Engel and others judgment of 8 June 1976, Series A no. 22, pp. 41-42, para. 100; cf., for Article 8 para. 2 (art. 8-2), De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, pp. 45-46, para. 93, and the Golder judgment of 21 February 1975, Series A no. 18, pp. 21-22, para. 45). Nevertheless, Article 10 para. 2 (art. 10-2) does not give the Contracting States an unlimited power of appreciation. The Court, which, with the Commission, is responsible for ensuring the observance of those States' engagements (Article 19) (art. 19), is empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression as protected by Article 10 (art. 10). The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its "necessity"; it covers not only the basic legislation but also the decision applying it, even one given by an independent court'.

³⁶⁸ For a recent overview of the doctrine and discussion of the case law in this context see Judge D.Spielmann, 'Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review', (CELS Working Paper, OUP) <http://www.cels.law.cam.ac.uk/cels_lunchtime_seminars/Spielmann%20-%20margin%20of%20appreciation%20cover.pdf> accessed 1.7.13.

³⁶⁹ *Sporrong and Lönnroth v. Sweden*, judgment of 23 Sept. 1982, Series A, No. 52; (1983) 5 EHRR 35 para 69.

³⁷⁰ *R (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 A.C.532 and discussed by T.Hickman, 'The Substance and Structure of Proportionality', (2008) Public Law at 696. See also *Pham v Secretary of State for the Home Department* [2015] UKSC 19 where Lord Mance when considering the choice of tool which could be utilised in

‘the reception of the principle of proportionality into domestic law has been a great advance, [but] it must be accompanied by a well-thought-out, clear, consistent and principled approach to its content and structure. This has not occurred. There is a real danger that proportionality will become no more than a label attached to the outcome of a judge’s consideration of the facts of the case’.³⁷¹

Furthermore, he argues that ‘the internal structure of proportionality needs to be carefully and clearly structured, its relationship with other substantive standards in public law must also reflect a broader principled structure’.³⁷² This is a particularly pressing issue in light of the recent disagreements on proportionality in the UK between the judiciary and the Parliament when balancing the right rights of criminals from abroad to remain in the UK against their right to family life under Article 8 of the European Convention of Human Rights and the difficulties of the balance when deciding how to prioritise competing abstract interests.³⁷³ So, for example, Teresa May has recently criticised UK judges as being too lenient in their approach and ignoring the will of Parliament in the

judicial review in a case concerning the removal of British citizenship under the power provided for by section 40(2) of the British National Act 1981 ruled at para 98 that ‘the tool of proportionality is one which would, in my view...be both available and valuable for the purposes of such a review’.

³⁷¹ Ibid at 714.

³⁷² Ibid at 715.

³⁷³ In the UK the traditional view of Parliament put forward by A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, (8th ed., London: Macmillan, 1915)- the doctrine of Parliamentary sovereignty - is that it is the supreme law-maker. This doctrine has been respected and recognised by the national UK courts as requiring judges to defer to the will of Parliament when interpreting statute law (see for example *British Railways Board v Pickin*, [1974] AC 765 per Lord Reid) although following the introduction of the Human Rights Act 1998 there has been debate on the extent to which an unelected judiciary should have the power to overturn the democratic will of the legislature in order to protect fundamental rights.³⁷³ See for example B.Foley, ‘Diceyan ghosts: Deference, rights, policy and spatial distinctions’, (2006) 28 DULJ 77 at 9 and who points out how ‘British courts have paid serious attention to the concept of deference under the Human Rights Act 1998’ and at 13 how ‘both academics and the courts routinely disagree over the extent to which deference is legitimate’. For wider theoretical discussion of the allocation of power between the judiciary and the legislature and the extent to which an unelected judiciary should be able to overturn legislation that is in breach of constitutionally protected rights see for example A.Young, ‘Deference, Dialogue and the Search for Legitimacy’, (2010) 30(4) 815-831’. See also at 176 her discussion regarding the part that judicial deference plays in testing for proportionality in the UK and the difficulties of determining exactly what that part is with reference to Laws LJ in *Huang v Secretary of State for the Home Department*, [2005] UWCA Civ 105, para 49 and who commented, ‘the nature and quality of the court’s task in deciding whether an executive decision is proportionate to the aim it seeks to serve is more conceptually elusive than has perhaps been generally recognised’.

*Huang and Kasmiri*³⁷⁴ case where the House of Lords ruled that the immigration rules, as secondary legislation, were subordinate to the court's interpretation of proportionality under Article 8 ECHR as incorporated by the Human Rights Act 1998 as they did not have full parliamentary endorsement.³⁷⁵ The dangers of an unstructured approach to proportionality are also considered by Hick who considers the judgment of Laws L.J. in *Nadarajah*³⁷⁶ and concludes that 'the result was reached without the application of any standard or test of justification.'

The question of exactly how a court should perform the proportionality test has also been the subject of judicial debate.³⁷⁷ For example in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* Lord Clyde ruled that undertaking a proportionality test in this case should involve 'whether the legislative objective is sufficiently important to justify limiting a fundamental right; the measures designed to meet the legislative objective are rationally connected to it; and the means used to impair the right or freedom are no more than is necessary to accomplish the objective'.³⁷⁸ In *Quilla*,³⁷⁹ a fourth criterion has been referred to as including the need to balance

³⁷⁴ *Huang (FC) (Respondent) v Secretary of State for the Home Department (Appellant) and Kasmiri (FC) (Appellant) Secretary of State for the Home Department (Respondent) Conjoined Appeals* (2007) UKHL 11.

³⁷⁵ <<http://www.publications.parliament.uk/pa/cm201213/cmhansard/cm120619/debtext/120619-0001.html#12061972000758>

³⁷⁶ T.Hickman, 'The Substance and Structure of Proportionality', (2008) Public Law at 716 comment on Laws L.J. in *R. (on the application of Nadarajah) v Secretary of State for the Home Department*, [2005] EWCA Civ 1363 at paras 67-68: 'I find it very unsatisfactory to leave the case there. The conclusion is not merely simple, but simplistic...Accordingly a public body's promise or practice as to future conduct may only be denied, and thus the standard I have expressed may only be departed from, in circumstances where to do so is the public body's legal duty, or is otherwise, to use a now familiar vocabulary, a proportionate response (of which the court is the judge, or the last judge having regard to a legitimate aim pursued by the public body in the public interest.'

³⁷⁷ In the 1990s, proportionality was rejected as an alternative tool of judicial review to reasonableness and it is still only used in UK administrative law under the HRA (*Daly* case is an exception), e.g. *R v. Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 where Lord Donaldson MR stated that 'It must never be forgotten that [judicial review] is a supervisory and not an appellate jurisdiction...Acceptance of 'proportionality' as a separate ground for seeking judicial review...could easily and speedily lead to courts forgetting the supervisory nature of their jurisdiction and substituting their view of what was appropriate for that of the authority whose duty it was to reach that decision.' Lord Ackner in the same case also suggested that it would amount to a usurpation of power. See also *R. v Secretary of State for the Home Department ex parte Brind* (1991) UKHL 4 where Lord Roskill stated that to use proportionality as an alternative tool of judicial review would force the court 'into substituting its own judgment of what was needed to achieve a particular objective for the judgment of the Secretary of State upon whom that duty has been laid by Parliament'.

³⁷⁸ [1999] 1 AC 69. See also other examples in *R (Samaroo) v SSHD* [2001] EWCA Civ 1139; UKHRR 150 and *Smith & Ors v Secretary of State for Trade and Industry* [2007] EWHC 1013 (Admin).

the interests of society with those of individuals and groups although in that case Endicott points out the Court was hampered in undertaking the balance in that,

‘little information was available to the Home Secretary or the Court. The government could not quantify the usefulness of the measure in fighting forced marriage. Faced with a number of young couples who were inconvenienced by the delay in starting their married life together in the place where they wanted to live, and faced with a nebulous prospect that the measure might deter some forced marriages, the United Kingdom supreme court held that the measure was disproportionate in its impact on voluntary spouses (and therefore unlawful under the UK Human Rights Act’.³⁸⁰

On the other hand, in the recent case of *Miranda v Secretary of State for the Home Department*,³⁸¹ Laws LJ considered Lord Sumption’s approach to the nature of the proportionality test in *Bank Mellat v Her Majesty’s Treasury* (No 2): namely ‘[T]he question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to that objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.’³⁸² This formulation, Laws argues adds a further requirement when considering the proportionality test namely ‘whether... a fair balance has been struck between the rights of the individual and the interests of the community’.³⁸³ This requirement, he explains,

‘appears to have been introduced into our law in *Razgar* [2004] 2 AC 368 (paragraph 20) and *Huang* [2007] 2 AC 167 (paragraphs 19 and 20), drawing on what was said by Dickson CJ in *R v Oakes* [1986] 1 SCR 103. I think it needs to be approached with some care. It appears to require the court, in a case where the impugned measure passes muster on points (i) –

³⁷⁹ *Quilla*, [2011] UKSC para 45.

³⁸⁰ T.Endicott, ‘Proportionality and Incommensurability’, in G.Huscraftm B. Miller and G.Webber (eds) *Proportionality and the Rule of Law, Rights, Justification, Reasoning*, (Cambridge University Press, 2014) 321.

³⁸¹ *Miranda v Secretary of State for the Home Department*, [2014] EWHC 255 (Admin).

³⁸² *Bank Mellat v Her Majesty’s Treasury* (No 2) 3 WLR 170, [2013] UKSC 39 at paragraph 20.

³⁸³ *Ibid* para 40.

(iii), to decide whether the measure, though it has a justified purpose and is no more intrusive than necessary, is nevertheless offensive because it fails to strike the right balance between private right and public interest; and the court is the judge of where the balance should lie. I think there is real difficulty in distinguishing this from a political question to be decided by the elected arm of government. If it is properly within the judicial sphere, it must be on the footing that there is a plain case'.³⁸⁴

This, Elliott argues, shows Laws J distinguishing the fair balance part of the proportionality test on the grounds that the Court is required to compare incommensurable values.³⁸⁵ Consequently Elliott concludes that the Court has to accord weight to each of these values before weighing these competing values against each other.³⁸⁶

In light of the increasing use of proportionality in the UK under the Human Rights Act 1998 and the imminent accession of the EU to the ECHR this begs the question of whether there will be a need to develop a single proportionality test for when the EU accedes to the ECHR.³⁸⁷ With this in mind, the next section turns to consider how there have been different levels of intensity of judicial review in light of the proportionality principle depending on the type of case being considered.

3.4 Differing levels of intensity of judicial review by the CJEU of national restrictions in light of the proportionality principle depending on the type of case being considered

In EU law too proportionality has been recognised as a general principle of EU law.³⁸⁸ Indeed, as Coutts highlights, proportionality in EU law 'is seen as the

³⁸⁴ Ibid.

³⁸⁵ M.Elliott, 'The Miranda case, the fair-balance test and deference', Public law for everyone <<http://publiclawforeveryone.wordpress.com/2014/02/20/the-miranda-case-the-fair-balance-test-and-deference/>> accessed 23.2.14.

³⁸⁶ Ibid.

³⁸⁷ Council of Europe, Accession of the EU to the European Convention on Human Rights, <http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/default_en.asp> accessed 14.1.14.

³⁸⁸ Article 5 (4) of the TEU provides that 'Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality'. For a general

golden thread for deciding on the desirability and the need for EU action in a given area'.³⁸⁹ It is also well evidenced in practice from the reasoning of the CJEU.³⁹⁰ As Harbo explains, 'the ECJ applies the proportionality principle when it balances legislative and administrative measures against private interests, individual rights and fundamental freedoms'.³⁹¹

An example of where the CJEU has applied the proportionality principle is evidenced by the CJEU in the case of *Alpine Investments*³⁹², a case concerning a Dutch firm which sold financial products by cold calling and Dutch national legislation which prohibited cold calling for all customers whether they were in the Netherlands or another Member State. Here the CJEU applied the proportionality principle and held that such a restriction on the cross-border offer services could be justified to protect investor confidence in national financial markets³⁹³ when it ruled in para 48 that,

'The Member State from which the telephone call is made is best placed to regulate cold calling. Even if the receiving State wishes to prohibit cold calling or to make it subject to certain conditions, it is not in a position to prevent or control telephone calls from another Member State without the cooperation of the competent authorities of that State' and in para 49 that, 'consequently, the prohibition of cold calling by the Member State from which the telephone call is made, with a view to protecting investor confidence in the financial markets of that State, cannot be considered to

discussion of the function of proportionality in EU law and an argument that the CJEU applies proportionality in different ways see T.Harbo, 'The Function of the Proportionality Principle in EU law', (2010) 16(2) European Law Journal 158-185.

³⁸⁹ E. Herlin-Karnell, 'Constitutional Principles in the Area of Freedom, Security and Justice', in D.Arcarazo and C.Murphy, *EU Security and Justice Law after Lisbon and Stockholm*, (Hart Publishing, 2014) 45

³⁹⁰ See Case 11/70 *Internationale Handelsgesellschaft mBH v Einfuhr und vorratsstelle für Getreide und Futtermittel* where the CJEU found that the EC regulatory measures were proportionate and consequently not infringing the right to property. See also T.Inge Harbo, 'The Function of the Proportionality Principle in EU Law', (2010) 16(2) European law Journal for a discussion of the function of the proportionality principle as a general principle of law in terms of securing legitimacy for judicial decisions; G. de Búrca, 'The Principle of Proportionality and its Application in EC Law', in (1993) 13 Yearbook of European Law 105-150,

³⁹¹ T.Harbo, 'The Function of the Proportionality Principle in EU law', (2010) 16(2) European Law Journal 158-185 at 171.

³⁹² Case C 384/93, *Alpine Investments BV v Minister van Financien*, [1995] 2 CMLR 209.

³⁹³ Ibid paras 45-50.

be inappropriate to achieve the objective of securing the integrity of those markets'.³⁹⁴

The use of proportionality has also been of relevance in the reasoning of the CJEU in the context of an individual EU 'market' citizen using the fundamental market freedoms under the Treaty following the case of *Van Gend*.³⁹⁵ For this latter case enabled individual EU market citizens to seek protection of these rights in national courts and, through the availability of the preliminary reference system pursuant to Article 267 TFEU, to access to the CJEU. This in turn has led to the CJEU being afforded the role of protector of the fundamental market freedoms of EU citizens as well as being placed in the position of arbitrator between the individual citizen and the Member State in this context using proportionality when considering Member State action and the position of the individual citizen.³⁹⁶ Kumm also highlights how the early use of proportionality by the CJEU was closely associated with the creation of human rights protection in the EU in the case of *Internationale Handelsgesellschaft*³⁹⁷ when he writes,

'it is possible to distinguish the familiar three main prongs of the test. The first concerns the question whether the measure at issue furthers a legitimate purpose. With regard to the forfeited deposits at issue in

³⁹⁴ See also Case 118/75, *Watson and Belman*, (1976) ECR 1185 where the CJEU in considering the proportionality of penalties for breach of EU law ruled in para 21 that 'other penalties, such as fines and detention, whilst the national authorities are entitled to impose penalties in respect of a failure to comply with the terms of provisions requiring foreign nationals to notify their presence which are comparable to those attaching to infringements of provisions of equal importance by nationals, they are not justified in imposing a penalty so disproportionate to the gravity of the infringement that it becomes an obstacle to the free movement of persons'.

³⁹⁵ Case 26/62 *NV Algemene transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

³⁹⁶ For a more general discussion of the development by the CJEU of the key EU law doctrines of supremacy and direct effect which have enabled an individual citizen to rely on EU law in a national court see for example A. Stone Sweet, *The Judicial Construction of Europe*, (OUP, 2004); A. Vauchez, *Integration-through-law: contribution to a Socio-history of EU Political common sense* <http://www.eui.eu/RSCAS/WP-Texts/08_10.pdf> accessed 1.7.13.

³⁹⁷ *Internationale Handelsgesellschaft* [1970] ECR 1125 ECR 1125. See also M. Kumm, 'Internationale Handelsgesellschaft, Nold and the New Human Rights Paradigm' in: M. Maduro, L. Azoulai (eds.), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of Rome* (Hart 2009) <http://www.law.harvard.edu/faculty/faculty-workshops/kumm.paper.ii.pdf> accessed 15.1.15 at 7 and who cites the Opinion of Mr. Dutheil de Lamothye, in Case 11/70 *Internationale Handelsgesellschaft* at p. 1146 that all human rights related questions 'concerning the internal legality of the disputed measures are linked to one and the same problem, namely whether or not these measures comply with a principle of 'proportionality', under which citizens may only have imposed on them, for the purposes of the public interest, obligations which are strictly necessary for those purposes attained.'

Internationale Handelsgesellschaft, for example, the court first established that they furthered a legitimate purpose: the deposit served as an instrument to ensure that the Commission was well informed about overall volume of export and import, thus providing valuable information on the structure of the market the Commission was charged to help regulate. Second, the measure has to be necessary. It is necessary if there are no other equally effective means to achieve the same goal. In *Internationale Handelsgesellschaft* the court found the rule regarding its forfeiture was necessary, in that alternative means, such as penalties imposed ex post, were not equally effective. Finally, the court examines whether the burden imposed is excessive or disproportionate when compared to its benefits. The court held that the system of deposits and the rules on forfeiture were not a disproportionate burden on the exporter, both because of the relatively modest amount of the deposit and the fact that in case of force majeure – which the court suggested should be interpreted liberally – the deposit was not forfeited.³⁹⁸

However, the use of proportionality by the CJEU also needs to be accompanied by a clear, consistent and principled approach to its content and structure in order to provide a clear doctrinal test that the CJEU can utilise in its case law. This relates to the rule of law principles of certainty and predictability.³⁹⁹ Examination of a selection of well documented CJEU case law on proportionality reveals that there is a considerable variety in the degree of intensity and application by the CJEU of proportionality tests as well as differences in the amount of guidance it gives to the Member States in this context.⁴⁰⁰ For example, following the case of *Dassonville*⁴⁰¹ and the CJEU's expansion of the scope of free movement thereby necessitating more recognition of the exceptions to free movement by the CJEU, proportionality has been increasingly used in EU law by the CJEU to determine the scope of the exception to the free movement principle.⁴⁰² The proportionality review undertaken by the CJEU in this context features three particular

³⁹⁸ Kumm Op.Cit. at 6.

³⁹⁹ For further discussion see B. Tamanaha, *On the Rule of Law: History, Politics, Theory*, (Cambridge University Press, 2004).

⁴⁰⁰ T.Harbo, 'The Function of the Proportionality Principle in EU law', (2010) 16(2) European Law Journal 158-185 and who argues this.

⁴⁰¹ Case 8/74 *Procureur du Roi v Dassonville* [1974] 2 CMLR 436.

⁴⁰² T.Tridimas, *The General Principles of EC Law* (2006, 2nd ed., Oxford, OUP) at 137 argues that it plays a central role in the case law of the CJEU.

characteristics.⁴⁰³ These have been considered by Jans and who outlines firstly ‘the national measure must be suitable actually to protect the interest that requires protection. There must, as it were, be a causal relationship between the measure and its object, i.e. it can achieve its object.’⁴⁰⁴

Secondly, Jans outlines how a second characteristic of a proportionality review in this context is whether there is a need for such a national measure.⁴⁰⁵ As he writes, ‘this implies, among other things, that there must be no measure less restrictive, but adequate, available to attain the objective pursued. In other words the familiar criterion of the least restrictive alternative’.⁴⁰⁶ This includes, he argues, considering whether the national measure is disproportionate in relation to the restriction to intra Community trade and is out of proportion with the result achieved.⁴⁰⁷ The CJEU in considering whether the national measure is disproportionate in relation to the restriction to intra Community trade and is out of proportion with the result achieved necessarily involves the CJEU in weighing up the conflicting interests at play.⁴⁰⁸ It is the most challenging characteristic of the proportionality review, argues Jans, in that it raises constitutional implications in terms of the distribution of power. For the CJEU has to review whether the national measure at issue in a case, and which poses a restriction to Community law is out of proportion with the result achieved and ‘the more intensive the

⁴⁰³ For further discussion of the German approach to proportionality see A.Brady, *Proportionality and Deference in the UK HRA*, (Cambridge University Press, 2012) at 52 and who writes ‘The BVerfGE uses a three stage test ‘The suitability arm of the test requires that the measure in question actively be capable of achieving its aim. It does not need to completely realise the aim, but must go some way towards it. The second aim of the German test, necessity, requires that the least rights-intrusive measure of achieving the aim be used. So, even if the challenged measure is suitable, it may not be the least rights-intrusive measure available and may fall foul of this stage of the test. The third stage, proportionality *stricto sensu*, requires that there be an overall balance between the seriousness of the interaction on the constitutional right and the gravity of the reason for the measure’.

⁴⁰⁴ J.H.Jans, ‘Proportionality Revisited’, (2000) 27(3) *Legal Issues of European Integration* 239-265 at 240 and at 243-5 for a discussion of the Court of Justice case law in this context. See also for example Case C-189/01 *Jippes* (2001) ECR I-5689 para 82; Case C-350/96, *Clean Car Autoservice* (1998) ECR I-2521 para 35

⁴⁰⁵ Jans Op.Cit. 243-5 and Tridimas Op.Cit. at 239.

⁴⁰⁶ Jans Op.Cit at 245-247 for a discussion of case law in this context.

⁴⁰⁷ Jans Op.Cit at 241 and a discussion of the few examples of the CJEU’s case law in this context at 248-252 where the ‘Court has explicitly formulated the proportionality as an obligation to balance interests.

⁴⁰⁸ Jans Op.Cit at 241 and who points out that express references to balancing interests by the CJEU are extremely rare 248. One example he cites where the CJEU has expressly referred to balancing of interests is in the *Stoke on Trent* case (Case C-169/91 *Council of the City of Stoke-on-Trent and Norwich City Council v B and Q PLC* [1992] ECR I-6635).

Court of Justice's scrutiny of national restrictions in light of the proportionality principle, the greater the shift in powers from the national legislatures to the European judiciary.⁴⁰⁹ The more intensive the scrutiny by the CJEU of national restrictions the closer this comes to the CJEU's approach to proportionality being merit-based.

So how much discretion is left to the national court when the CJEU is scrutinising national restrictions in light of the proportionality principle? In the context of free movement de Búrca argues this very much depends on the nature of the relevant public interest.⁴¹⁰ The difference in levels of intensity of judicial review when undertaking a proportionality test has been argued by Tridimas to depend on the type of case.⁴¹¹ So, for example, he argues that where the CJEU 'is involved in review of a Community measure where the CJEU will not strike down a measure unless it considers it manifestly inappropriate to achieve its objectives'.⁴¹² Such an approach by the CJEU is close to *Wednesbury*⁴¹³ in its light touch towards review of EU measures, as opposed to review of national implementing measures where Gerards explains the burden is placed 'on the individual challenging the administrative act to demonstrate that it is substantially unreasonable'.⁴¹⁴ Furthermore, it implies that no specific test of proportionality will be applied....the application of a test of proportionality would mean that a court would have to consider the relative weight according to a variety of interests and considerations, assess the balancing of the various interests involved in the decision and judge whether the administrative activity was really necessary'.⁴¹⁵ This Gerards concludes would be inappropriate as the courts 'are not considered

⁴⁰⁹ Jans Op.Cit at 242.

⁴¹⁰ G.de Búrca, 'The Principle Of Proportionality and its Application in EC Law', (1993) Yearbook of European Law 105 at 125 and see also Case C-292/97 *Karlsson* [2000] ECR I-2737 para 60 where the CJEU in considering the proportionality of the exercise of a Member States discretionary powers in relation to the fixing of milk quotas held that 'the Member State cannot be exceeding its discretionary powers where the quantities not allocated are so small'.

⁴¹¹ T. Tridimas, 'Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny', in E.Ellis *The Principle of Proportionality in the Laws of Europe*, (Hart Publishing, 1999).

⁶⁶

⁴¹² Ibid

⁴¹³ *Associated Provincial Picture Houses v. Wednesbury Corporation* [1947] EWCA Civ 1, [1948] 1 K.B. 223, Court of Appeal (England and Wales).

⁴¹⁴ J.Gerards, 'Fundamental Rights and Other Interests – Should It Really Make a Difference?' In E.Brems, (eds), *Conflicts between Fundamental Rights*, (Antwerpen/Oxford/Portland: Intersentia, 2008) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1435247> accessed 12.6.13 at 675.

⁴¹⁵ Ibid.

to be sufficiently equipped to apply such an exacting test'.⁴¹⁶ So this is the same criticism again about the judiciary making substantive policy choices.

On the other hand, Tridimas argues, where the CJEU is involved in a case where it is argued that a national measure is contrary to a Community fundamental freedom and the CJEU is required to balance Union interests against the national interest 'the principle is applied as a market integration mechanism and the intensity of the review is much stronger'.⁴¹⁷ This is illustrated for example in the cases of *Schmidberger*.⁴¹⁸ The case itself involved environmentalists protesting on the Brenner motorway in Austria with the implicit permission of the Austrian authorities. It was argued that the Austrian authorities were acting contrary to Article 30. The CJEU here considered its case law category of exceptions and weighed up the conflicting principles of free movement of goods and the fundamental right to freedom of expression and determine an appropriate balance had been reached by the Austrian authorities when they had implicitly permitted the demonstration.⁴¹⁹ In weighing up these competing interests, the CJEU pointed out that the competent authorities enjoy a wide margin of discretion in that regard ruling and that 'it is necessary to determine whether the restrictions placed upon intra-Community trade are proportionate in the light of the legitimate objective pursued, namely, in the present case, the protection of fundamental rights'.⁴²⁰ *Schidberger* is an example of a more deferential approach by the CJEU where the CJEU distinguished the facts at issue in this case from the *CMS v France*⁴²¹, another case concerning a demonstration which prevented the free movement of goods, in various ways. For example, on the grounds that the demonstration in *Schmidberger* had taken place following a request for authorisation to the Austrian authorities and after the Austrian authorities had decided not to ban it.⁴²² Secondly, on the grounds that the demonstration took place only once, on a single route and for a limited time unlike in the *Commission v France* case where there had been serious disruption over a period of time. Thirdly, that the Austrian citizens' purpose here was in exercising their right to freedom of expression rather

⁴¹⁶ Ibid.

⁴¹⁷ T. Tridimas, 'Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny', in E.Ellis *The Principle of Proportionality in the Laws of Europe*, (Hart Publishing, 1999) at 66.

⁴¹⁸ Case 112/ 00 *Schmidberger* [2003] ECR I-5659 (CJEU) 74.

⁴¹⁹ Ibid at para 81.

⁴²⁰ Ibid para 82

⁴²¹ Case 265/95 *Commission v. France* [1997] ECR I-6959 (CJEU) 73.

⁴²² Ibid para 84

than to restrict the free movement of goods as in the *Commission v France* case where the French farmers were seeking to obstruct the free movement of goods.⁴²³ Fourthly, that the Austrian authorities had taken steps to mitigate the disruption by putting in place various administrative and supporting measures.⁴²⁴ Ultimately, the CJEU concluded that, ‘the national authorities were reasonably entitled, having regard to the wide discretion which must be accorded to them in the matter, to consider that the legitimate aim of that demonstration could not be achieved in the present case by measures less restrictive of intra-Community trade’⁴²⁵. Thus in this case we see the CJEU actually performing a proportionality review and balancing the interests involved in order to assess whether the right balance had been achieved even though in practice Jans argues the CJEU generally does not carry out the balancing⁴²⁶ i.e. because it leaves it to the national courts.

In respect of weighing the balance here, the CJEU in this case also, by referring to the free movement principles as being fundamental, equates free movement with fundamental rights thus enabling it to weigh the balance in favour of free movement here even when the disruption to free movement was de minimus. As Gerards points out,

‘on a more abstract level, the judgement may thus be understood as meaning that the four freedoms constitute fundamental rights as much as civil and political rights. This equalisation of the four freedoms with fundamental rights is the more interesting as the freedoms are primarily economic in character, having been created to guarantee free trade within the internal market in the first place’.⁴²⁷

More recently in the case of *Anton Las*,⁴²⁸ the CJEU has demonstrated how even where it accepts the Member States justification for particular national measures

⁴²³ Ibid para 86

⁴²⁴ Ibid para 87.

⁴²⁵ Ibid para 93.

⁴²⁶ Jans Op.Cit. at 248 Case C-169/91 *Council of the City of Stoke-on-Trent and Norwich City Council v B and Q PLC* [1992] ECR I-6635 referring to Stoke on Trent case where the CJEU balanced the interests at issue.

⁴²⁷ J.Gerards, ‘Fundamental Rights and Other Interests – Should It Really Make a Difference? In E.Brems, eds, *Conflicts between Fundamental Rights*, (Antwerpen/Oxford/Portland: Intersentia, 2008) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1435247> accessed 12.6.13 at 669. See also N.Nic Suibhne, ‘Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement law’, (2009) 34 (2) *European Law Review* 230-256.

⁴²⁸ Case C 202/11 *Anton Las v. PSA Antwerp NV*.

to protect a language pursuant to Art 4(2) TEU,⁴²⁹ it is prepared to challenge those national measures as being disproportionate to the objectives relied upon by the national legislature and consequently contrary to Article 45 TFEU. For here the appropriateness of Belgium rules requiring employers of a business situated in a particular federated entity to draft cross-border employment contracts in the official language of that particular federated entity, were deemed by the Advocate General, and later by the CJEU, as disproportionate in nature and that other more appropriate measures could have been adopted.⁴³⁰ As the Advocate General highlighted,

‘There are other, less restrictive, means of protecting employees which are just as, if not more, effective, whilst preserving use of the regional language, such as making it easier for the employee or employer who is not familiar with the language to use translations into a language which the person concerned understands sufficiently well.’⁴³¹

The CJEU too agreed with the Advocate General and rejected the arguments put forward by the Belgian Government that,

‘the legislation at issue in the main proceedings addresses a three-fold need, first, to promote and encourage the use of one of its official languages, next, to ensure the protection of employees by enabling them to examine employment documents in their own language and to enjoy the effective protection of the workers’ representative bodies and administrative and judicial bodies called upon to recognise those documents, and, finally, to ensure the efficacy of the checks and supervision of the employment inspectorate’.⁴³²

Neither the CJEU nor the Advocate General considered and weighed up evidence to support its rejection of the arguments put forward by the Belgium government that such legislation was needed to safeguard the use of an official language, ensure protection of employment contracts in their own language and respect the decisions of the national body tasked with supervising employment documents. Rather the CJEU simply concluded ‘ In the light of the foregoing, it must be held

⁴²⁹ Case C 202/11 *Anton Las v. PSA Antwerp NV* para 26.

⁴³⁰ Case C 202/11 *Anton Las v. PSA Antwerp NV* para 33.

⁴³¹ Case C 202/11 *Anton Las v. PSA Antwerp NV* Advocate General’s opinion paras 75-8.

⁴³² Case C 202/11 *Anton Las v. PSA Antwerp NV* para 24.

that legislation such as that at issue in the main proceedings goes beyond what is strictly necessary to attain the objectives referred to in paragraph 24 of this judgment and cannot therefore be regarded as proportionate'.⁴³³

On the other hand, in light of the discretion involved in the CJEU undertaking a proportionality review, is the CJEU well placed to engage in an assessment of the complex normative and empirical questions that a proportionality review requires? This is an important question. The CJEU is required to give reasons and justify in its ruling following assessment of both the empirical and normative dimensions of a proportionality review to ensure the legitimacy of its decision. It also has to convince the national courts of the validity of its ruling in light of the supervisory role the national court has over the CJEU. For the CJEU relies on the national court not just for questions raised through the preliminary reference but also for the national court to give effect to the CJEU's preliminary ruling. Ultimately, the national court can in principle refuse to give effect to the CJEU's preliminary ruling, although this does not happen in practice.⁴³⁴ Nevertheless, the more contestable the balancing approaches of the CJEU the more it feeds into doubts at national level about accepting supremacy.⁴³⁵ Consequently, in light of the immense use of proportionality in EU law⁴³⁶ as well as the different levels of intensity of review adopted by the CJEU in different contexts and the imminent accession of the EU to the ECHR there is an even more pressing need to consider whether there is a need for a single proportionality test and for the justification of whatever proportionality test is in fact adopted.⁴³⁷

For if the EU applies a different proportionality test to that of the ECHR, this runs the risk of inconsistent standards between the two systems. Accession may also cause difficulties where there is a conflict between a provision of EU and

⁴³³ Case C 202/11 *Anton Las v. PSA Antwerp NV* para 33.

⁴³⁴ There are more indications of national courts being more willing to question the CJEU, as in the recent Czech case of Case C-399/09, *Marie Landtová v. Česká správa sociálního zabezpečení*.

⁴³⁵ See also P.Craig and G. de Búrca, *EU law Cases and Materials*, (5th ed., OUP, 2011) pages 272- 283 for a discussion of German case law regarding the reluctant acceptance of supremacy of EU law and the limits laid down in that case law.

⁴³⁶ Ibid who writes 'that the principle is invoked by litigants more often than any other general principle of Community law'.

⁴³⁷ See also C.Vaca, 'EU Citizenship before the CJEU: On the importance of the application of the proportionality principle', (2013) 5 (1) *Perspectives on Federalism* and who argues at 28 that 'The legitimacy of the application of the proportionality principle is undermined if human rights are underestimated'.

provisions of the European Convention on Human Rights in that the former is binding on EU member States by virtue of the doctrine of supremacy of EU law over national law.⁴³⁸

With this in mind, and having acknowledged the theoretical perspectives of both subsidiarity and proportionality, the chapter turns to consider how the concept of subsidiarity came to be detached from its historical roots and instead in EU law linked with proportionality to law-making in shared competence areas and determining in principle more than in CJEU practice whether the EU or the Member States should act.

4 Subsidiarity and Proportionality in EU law-making in shared areas of competence

4.1. A conceptual link between conferral, subsidiarity and proportionality

Since its inception, a guiding principle for the EU is that it only has the competence⁴³⁹ or the power to act that has been conferred on it by the Treaties.⁴⁴⁰ For although the explicit inclusion of the principle of conferral was only included in the Treaty of Maastricht,⁴⁴¹ it was implicit in the debate over who are the masters of the Treaties.⁴⁴² In respect of the different types of competence, currently, although the TFEU refers to three categories of competence in Article 5 TFEU,⁴⁴³ the focus of this discussion is in relation to Article 3(2) TEU where the EU shares competence with the Member States. This provides that ‘The Member States will only be able to exercise this shared competence if the EU has not

⁴³⁸ Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585.

⁴³⁹ For further discussion of the definition of power or competence see Wesley Hohfeld’s definition of power or competence as the capacity or amenity to change legal relations: W. Hohfeld, ‘Some Fundamental Legal Conceptions As Applied in Judicial Reasoning’, 1913-14 23 *Yale LJ* 16-59 at 55

⁴⁴⁰ For further discussion see K.Alter, ‘Who are the Masters of the Treaty? European Governments and the European Court of Justice’, (1998) 52 *International Organization* 121-147.

⁴⁴¹ Article 3b Treaty of Maastricht 7.2.92.

⁴⁴² See for egs K.Alter, ‘Who are the Masters of the Treaties: European Governments and the ECJ’, <http://aei.pitt.edu/2434/1/002500_1.pdf> accessed 14.1.14.

⁴⁴³ Firstly in Article 3 TFEU there is exclusive competence. There is also in Article 2 (3) TFEU and Article 2 (5) TFEU two further categories of competence which R.Schütze, ‘Lisbon and the federal order of competences: a prospective analysis’, (2008) *European Law Review*, 3, refers to as co-coordinating competence and complementary competence. For a more general discussion on competence in the EU see Dashwood, ‘The Limits of European Community Powers’, (1996) 21 *European Law Review* 113-128 and S.Wetherill, ‘Competence creep and competence control’, (2001) 4 23 *Yearbook of European Law* 1-55: House of Lords European Union Tenth Report (2008), chapter 2, paragraph 21.

exercised its competence to act or if the EU has ceased to exercise its competence’. It is in this specific context where the EU has competence to act that Article 5 TEU provides that the EU must observe the principles of conferral, subsidiarity and proportionality.⁴⁴⁴ All three of these principles are also conceptually linked. Furthermore, all three principles succeed each other and as Kumm argues, all these principles have a central constitutional role in the protection of federalism values in the EU: they decide the balance of authority and power.⁴⁴⁵ However, although all three succeed each other in the Treaty, they also point towards a role in balancing the two opposing forces of centralisation and decentralisation. In light of this link and its role at a conceptual level in balancing the two opposing forces of centralisation and decentralisation, the chapter now turns to explain first the reasons for adoption of the subsidiarity principle in particular as a key constitutional principle of EU law and its conceptual links between conferral and proportionality.

4.2 Subsidiarity alongside proportionality in EU law-making in shared areas of competence

Article 5 TEU requires the EU institutions to comply with the principle of subsidiarity and is concerned with the initial decision to exercise competence when acting in areas where it shares competence with the Member States. It requires the EU to ensure that it should only act ‘only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level’. Article 5 also includes that the EU institutions when exercising shared competence should comply with the principle of proportionality. This concerns the intensity of any EU legislative action. Proportionality is defined in Article 5 TEU. It requires that when the EU is bringing in legislation in areas of shared competence that ‘the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties’. Proportionality provides a further safeguard to support subsidiarity and localism in that it ensures that any

⁴⁴⁴ The wording of Article 5 applies to non-exclusive competences. Subsidiarity is most important re shared competences because of the major impact of the latter – when exercised, shared competence eliminates Member State competence in the same area.

⁴⁴⁵ M.Kumm, (2006) ‘Constitutionalising subsidiarity in Integrated Markets: the Case of Tobacco Regulation in the European Union’ (12(4) ELJ 503-533 at 531.

regulatory freedom of the EU in areas of shared competence is limited to what is necessary to achieve any particular Treaty objective.

A key purpose for the introduction of Article 5 TEC into EU law-making in shared competence areas was to help quell the fears of the Member States of too much incursion on the part of the EU.⁴⁴⁶ Thus, in particular with regard to the use of subsidiarity in EU law-making, Article 5 TEC made it clear that subsidiarity must be considered only in relation to areas which do not fall within the exclusive competence of the Community. Prior to the Treaty of Lisbon, this Treaty requirement inevitably led to difficulties in that it was not always clear which areas were within the exclusive competence of the EU. There was also a vague scope as to what was within the area of exclusivity, the latter providing fertile ground for contestation. The CJEU has not always been consistent in its approach to determining the scope of what is within the area of exclusivity. On the one hand, in the case of *Kadi*,⁴⁴⁷ the CJEU was called upon to consider the extent of Community competence under Article 308 TEC in a case where the facts of the case were linked to competition. The case concerned a contested measure implementing a regulation of an economic measure, here a Regulation freezing funds and economic resources of particular persons and entities. In particular the CJEU considered if such a Regulation fell within the scope of Article 308 TEC and whether such a Regulation,

‘could have a particular effect on trade between Member States, especially with regard to the movement of capital and payments, and on the exercise by economic operators of their right of establishment. In addition, they could create distortions of competition, because any differences between the measures unilaterally taken by the Member States could operate to the advantage or disadvantage of the competitive position of certain economic operators although there were no economic reasons for that advantage or disadvantage’.⁴⁴⁸

⁴⁴⁶ P.Craig and G.de Búrca, *EU Law Text, Cases and Materials*, (3rd ed. OUP., 2003) at 132 and who write ‘For those who feared further movement to some species of federalist Community the concept of subsidiarity was the panacea designed to halt such centralizing initiatives’.

⁴⁴⁷ Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649 220 at 221.

⁴⁴⁸ *Ibid.*, para 230.

Regarding whether such a Regulation fell within the scope of Community competence in relation to Article 308 TEC, the CJEU then initially ruled that ‘Article 308 EC, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the EC Treaty as a whole’.⁴⁴⁹ But it then went on to rule there were other Treaty articles, here Article 60 and 301 TEC, from which an objective constituting and objective of the Community for the purposes of Article 308 could be discerned.⁴⁵⁰ Ultimately the CJEU concluded that these other relevant Treaty articles formed an expression of ‘[an] implicit underlying objective, namely that of making it possible to adopt such measures through the efficient use of a Community instrument’.⁴⁵¹ Thus here the CJEU amalgamated provisions to produce a more abstract basis for the objectives of the Community overall which more easily allowed the justification of EU competence.

On the other hand, in the *Tobacco Advertising case*,⁴⁵² the CEJU adopted a more restrictive approach when considering whether any potential impact on competition between the Member States was enough to bring a matter within the competence of the Community, that in the absence of a threshold for determining effect of distortion of competition for a justification for the Community to exercise competence, ‘the powers of the Community legislature would be practically unlimited’.⁴⁵³ Such differing approaches by the CJEU in this context emphasises the difficulties facing the CJEU in respect of the vague scope of what is within the areas of exclusivity.⁴⁵⁴

Furthermore, and as Davies points out in relation to the *Tobacco Advertising case*, ‘the Court may, or may not, limit it by case law, but the article itself does not provide a sense that Community competence is contained’.⁴⁵⁵ In particular, the CJEU has sought to set a threshold in relation to encompassing the scope of free

⁴⁴⁹ Ibid., para 203

⁴⁵⁰ Ibid., para 227.

⁴⁵¹ Ibid., para 220.

⁴⁵² Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419 ECR I-8419.

⁴⁵³ Ibid., para 107.

⁴⁵⁴ For further discussion of how to construe exclusive competences prior to the Lisbon Treaty; see also A.G.Toth, A Legal Analysis of Subsidiarity, Bull.EC.10-1992 at 116; J.Steiner, ‘Subsidiarity under the Maastricht Treaty’, in O’Keefe and Twomey (eds.) *Legal Issues of the Maastricht Treaty* (Chancery, 1994) 39-40.

⁴⁵⁵ G. Davies, ‘Subsidiarity: The wrong idea, in the wrong place, at the wrong time’, (2006) 43 Common Market Law Review 63-84 at 65.

movement and undistorted competition in the *Tobacco Advertising case*.⁴⁵⁶ It therefore set a threshold of ‘appreciable impact on competition’,⁴⁵⁷ even though previously in the cases of *van de Haar and Kaveka de Meern*⁴⁵⁸ the CJEU had refused to set any comparable threshold in the free movement context.

The wording of Article 5 TEC did, however, include a subsidiarity requirement that the EC should only take action in shared competences ‘insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community’. The latter part of Article 5 TEC then set out the proportionality principle that is ‘that any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty’.⁴⁵⁹

Thus, in respect of subsidiarity following the introduction of Article 5 TEC, and as the European Commission has highlighted, there is a requirement to undertake a test of comparative efficiency when proposing Community action in a shared policy area.⁴⁶⁰ As Rasmussen argued this would require the CJEU to make an empirical assessment it is questionable not only whether the CJEU is well-placed to carry out such an assessment but also how would it be able to carry this out without access to accurate and up-to-date data.⁴⁶¹ In any event, the CJEU has not really addressed this criticism since it was first made by Rasmussen.⁴⁶²

There are also difficulties in determining the exactly how subsidiarity should be operationalized in EU law in areas of shared competence.⁴⁶³ For example, how is it weighed up and concluded that a Member State is unable to achieve an objective sufficiently and that consequently such an objective can be better achieved at Union level? What factors are at play in the determination of this and

⁴⁵⁶ Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419 ECR I-8419, discussed further in chapter 3.

⁴⁵⁷ Davies Op.Cit. at 65 and para 67 Joined Cases 177 and 178/82 *Van de Haar and Kaveka de Meern* [1984] ECR 179 where the CJEU previously refused to set any comparable threshold re impact of free movement.

⁴⁵⁸ Joined Cases 177 and 178/82 *van de Haar and Kaveka de Meern*, [1984] ECR 1797.

⁴⁵⁹ . For further discussion of the proportionality principle in Article 5 TEC see P.Craig and G.de Búrca, (4th ed., 2008) at 103 and T.Inge Harbo, ‘The function of the Proportionality Principle in EU law’, (2010) 16 (2) *European Law Journal* 158-185.

⁴⁶⁰ Commission Communication to the Council and the European Parliament, (1992) *Bulletin EC* 10 at 116.

⁴⁶¹ See H.Rasmussen, *On Law and Policy in the EU: A Comparative Study in Judicial Policy Making* (Dordrecht: Martinus Nijhoff Publishers, 1986.)

⁴⁶² Ibid.

⁴⁶³ P.Craig and G.de Búrca, *EU Law: Text, Cases and Materials*, (3rd. ed., Oxford: Oxford University Press, 2002) 132.

what factors or combination of factors push the determination one way or another i.e. how is subsidiarity operationalized? Further clarification on how subsidiarity was to be operationalised in EU law-making in shared areas of competence has been provided several times. For example, in 1993 an Interinstitutional Agreement on Procedures for implementation of the principle of subsidiarity was issued.⁴⁶⁴ In particular the Agreement required the EU institutions ‘to have regard to the principle when devising Community legislation’.⁴⁶⁵ Furthermore, in paragraphs 2-4 it included that,

‘The explanatory memorandum for any Commission proposal shall include a justification of the proposal under the principle of subsidiarity.³ . Any amendment which may be made to the Commission's text, whether by the European Parliament or the Council, must, if it entails more extensive or intensive intervention by the Community, be accompanied by a justification under the principle of subsidiarity and Article 3b. 4. The three institutions shall, under their internal procedures, regularly check that action envisaged complies with the provisions concerning subsidiarity as regards both the choice of legal instruments and the content of a proposal. Such checks must form an integral part of the substantive examination’.

However, the Agreement did not usefully further specify how to apply subsidiarity.

A subsequent Protocol⁴⁶⁶ on the application of the principle of subsidiarity and proportionality was also attached to the Treaty of Amsterdam in 1999. This included more guidance on where the principle of subsidiarity should have relevance in the legislative procedure⁴⁶⁷. In particular the Protocol stressed the importance of justifying the need for Community action on the grounds of the Community being best placed to correct distortion of competition significantly in shared areas of competence.⁴⁶⁸ However, paragraphs 4.5 and 9 of the Protocol also required that the Commission justify any proposed measure having regard for subsidiarity and paragraph 11 required that any amendments by the Council or the

⁴⁶⁴ Interinstitutional Agreements of 25 October 1993 on the procedures for implementing the principle of subsidiarity OJ C 329, 6.12.1993 at 135.

⁴⁶⁵ Craig, de Búrca, Op.Cit. at 135.

⁴⁶⁶ Protocol no 30 on the Application of the Principles of Subsidiarity and Proportionality was annexed to the 1999 Amsterdam Treaty [1997] OJ 340/1.

⁴⁶⁷ Craig and de Búrca Op.Cit. at 136.

⁴⁶⁸ Protocol no 30 1997 at para 3.

European Parliament must also be justified with reference to subsidiarity.⁴⁶⁹ Thus, as Craig and de Búrca highlight, following the Protocol, ‘minimum, rather than total, harmonization is now more the norm’.⁴⁷⁰

Furthermore, the Commission is now required to show evidence that a sufficiency calculation of proposed Community action has been undertaken. This requires the Commission to justify action at Community level by way of two criteria which are complementary to one another namely: ‘1. The absence of action at European level might have negative consequences for the effectiveness⁴⁷¹ of instruments envisaged by the Member States and/or be contrary to the requirements of the Treaty. 2. “Action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States’.⁴⁷² Paragraph 7 also reinforces that the EU institutions must also respect proportionality by including that ‘the Community shall legislate only to the extent necessary’ to achieve its objectives.

Nevertheless despite such clarification, difficulties still remained with not only with defining and operationalizing subsidiarity but also how the CJEU has failed to connect the proportionality test to subsidiarity as required by Article 5 TEU.⁴⁷³ With this in mind, the next section argues that the concept of subsidiarity is an essentially contested concept with reference to an argument by Gallie.⁴⁷⁴

5. Is EU Subsidiarity an essentially contested concept?

The aim of this section is to contend that the nature and scope of the concept of subsidiarity is contested⁴⁷⁵ on the grounds that there are different arguments as to

⁴⁶⁹ For further discussion see G. de Búrca, ‘Reappraising Subsidiarity’s Significance after Amsterdam’, Jean Monnet Working Paper 7/1999 <www.jeanmonnetprogram.org/> last accessed 12.7.12.

⁴⁷⁰ Craig and de Búrca Op.Cit. at 136.

⁴⁷¹ An emphasis on *effet utile* is also widely prevalent in the reasoning of the CJEU. For further discussion see F.Snyder, ‘The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques’, 56 (1) *Modern Law Review* 19-54.

⁴⁷² See *Better Law-making 2000*, COM (2000) 772 final at page 15. For further discussion of the use of subsidiarity as a principle of economic efficiency see A.Portuese, ‘Principle of Subsidiarity as principle of economic efficiency’, (2011) *Columbia Journal of European Law*.

⁴⁷³ M.Kumm, (2006) ‘Constitutionalising subsidiarity in Integrated Markets: the Case of Tobacco Regulation in the European Union’ (12(4) *ELJ* 503-533 at 531 who cites the example of the *Swedish Match* Case C—210/03.

⁴⁷⁴ W.B.Gallie, ‘Essentially Contested Concepts’, (1956) *Proceedings of the Aristotelian Society* 167-98.

⁴⁷⁵ The phrase essentially contested concepts was first used by W.B.Gallie, ‘Essentially Contested Concepts’, (1956) *Proceedings of the Aristotelian Society* 167-98.

how the nature and scope of subsidiarity should be interpreted at both a national and an international level. This contention is made with reference to an idea posed by Gallie who wrote that ‘if you can break down a concept into different elements and there are different arguments on how each element should be interpreted then such a concept is an essentially contested concept’.⁴⁷⁶

Thus according to Gallie an essentially contested concept relies on there being a consensus as to a concept being an exemplar but disagreement as to how the various parts of the concept should be interpreted. He further argues that there is also disagreement about how the concept should be applied in practice for when a concept is an exemplar, conflict is almost inevitable when different authors put forward different views as to how such an exemplar is to be realised. Gallie then proposes various conditions which a concept must satisfy in order to be identified as an essentially contested concept. The conditions that Gallie proposes are as follows:-

The first condition he outlines is that the concept must be an exemplar and represent a value that is worth realising in practice.⁴⁷⁷ The second condition he outlines is that to achieve in practice such a worthy aim the concept ‘must be of an internally complex character’.⁴⁷⁸ Gallie explains this second condition, using the concept of ‘champions,’ that there is no general method or principle for being a champion for if there was ‘the concept of the champions would cease to be an essentially contested one’.⁴⁷⁹ Thus according to Gallie, the concept of ‘champion’ has an internally complex character as there is no general method for being a champion.

The third condition he outlines is that the concept must include reference to respective contribution of the various parts; yet prior to experimentation there is nothing absurd or contradictory in any one of a number of possible rival descriptions of its total worth, one such description setting its component parts or features in one order of importance, a second setting them in a second order, and so on. In fine, the accredited achievement is initially variously

⁴⁷⁶ W.B.Gallie, ‘Essentially Contested Concepts’, (1956) *Proceedings of the Aristotelian Society* 167-98 at 169.

⁴⁷⁷ *Ibid.*, at 171.

⁴⁷⁸ *Ibid.*

⁴⁷⁹ *Ibid.*, at 178.

describable'.⁴⁸⁰ The fourth condition he outlines is that the realisation of such a worthy aim 'must be of a kind that admits of considerable modification in light of changing circumstances and such modification cannot be prescribed or predicted in advance'.⁴⁸¹ The fifth condition he outlines is that there should be a contestation of the concept at its core and debates can be used either aggressively or defensively.⁴⁸² The final two conditions Gallie considers as being necessary to justify the continued use of essentially contested concepts. The first of these later conditions is that 'authority is acknowledged by all the contestant users'.⁴⁸³ The second of these outlined by Gallie is that the fact that there are disputes over the nature of the concept 'enables the original exemplars achievement to be sustained and/or developed in optimal fashion'.⁴⁸⁴

Anchoring a particular concept by using exemplars in order to demonstrate what is nearer to the heart of a particular concept, however, would help to minimise the risk of a dispute as to how it a particular concept should be operationalized in adjudication. Such an approach would directly address the chief concern raised by Gallie that essentially contested concepts are at continual risk of being disputed. It is for this reason that Gallie's theory of essentially contested concepts, and the aforementioned conditions that Gallie argues must be fulfilled in order for a concept to be deemed an essentially contested practice, provides a useful conceptual framework in this thesis for helping to identify the core of values of subsidiarity.

On the other hand it should be acknowledged that Beck has argued that some of these conditions partially restate each other⁴⁸⁵ with others arguing that in light of the relatedness of some of these conditions that it is the first of these conditions that are of the greatest import. So, for example Collier et al regard the first five conditions as the defining characteristics for an essentially contested concept.⁴⁸⁶

⁴⁸⁰ Ibid at 172.

⁴⁸¹ Ibid.

⁴⁸² Ibid. See also see Waldron 'Is the Rule of Law an Essentially Contested Concept (in Florida): 2002 21(2) Law and Philosophy pp 137-164) who argued at 148-9 that Gallie's term essentially contested concepts 'refers to the location of the disagreement or indeterminacy; it is contestation at the core, not just at the borderlines or penumbra of a concept'.

⁴⁸³ W.B.Gallie, 'Essentially Contested Concepts', (1956) Proceedings of the Aristotelian Society 167-98 at 180.

⁴⁸⁴ Ibid.

⁴⁸⁵ G.Beck, 'The Mythology of Human Rights', (2008) 21(3) Ratio Juris 312-347 at 325.

⁴⁸⁶ D.Collier, F.D.Hidalgo and A.Maciuceanu, 'Essentially contested concepts: Debates and applications', (2006) II 236.Journal of Political Ideologies 211-246.

This agrees with Collier that it is the first five conditions which are the defining characteristics for an essentially contested concepts namely that concepts are an exemplar and represent a value that is worth realising in practice;⁴⁸⁷ concepts ‘must be of an internally complex character;’⁴⁸⁸ the accredited achievement is initially variously describable;⁴⁸⁹ ‘the realisation of such a worthy aim ‘must be of a kind that admits of considerable modification in light of changing circumstances and such modification cannot be prescribed or predicted in advance’;⁴⁹⁰ there should be a contestation of the concept at its core and debates can be used either aggressively or defensively.⁴⁹¹

The line of argument that subsidiarity is an essentially contested concept with reference to Gallie’s characteristics of an essentially contested concept⁴⁹² therefore holds considerable promise for use in respect of subsidiarity despite firstly a caveat expressed by Waldron namely that ‘the idea [of contested concepts] is clearly vulnerable to overuse’.⁴⁹³ This is similar to Clarke’s concern that ‘it is possible to make sense of the notion of an essentially contested concept, but only at the cost of introducing a radical relativism into all discourse using such disputable concepts’.⁴⁹⁴ Thus it is important when considering whether a concept is an essentially contested one to test that concept for the presence of the characteristics highlighted by Beck as required to determine the existence of an essentially contested concept. The five characteristics highlighted by Beck⁴⁹⁵ as being the most important of Gallie’s characteristics for an essentially contested concept are summarized first. Reference is also made to some examples of the application of Gallie’s characteristics to the concepts of human rights by Beck and the rule of law by Waldron. The purpose of such discussion is to inform a subsequent discussion considering whether the EU’s concept of subsidiarity meets

⁴⁸⁷ W.B.Gallie, ‘Essentially Contested Concepts’, (1956) *Proceedings of the Aristotelian Society* 167-98 at 171.

⁴⁸⁸ *Ibid.*

⁴⁸⁹ *Ibid.*, at 172.

⁴⁹⁰ *Ibid.*

⁴⁹¹ *Ibid.* See also see Waldron ‘Is the Rule of Law an Essentially Contested Concept (in Florida): 2002 21(2) *Law and Philosophy* pp 137-164).

⁴⁹² W.B.Gallie, ‘Essentially Contested Concepts’, (1956) *Proceedings of the Aristotelian Society* 167-98.

⁴⁹³ Waldron *Op. Cit.* at 148.

⁴⁹⁴ B.Clarke, ‘Eccentrically Contested Concepts’, (1979) 9 *British Journal of Political Science* 122-126.

⁴⁹⁵ Beck *Op.Cit.* at 325.

Gallie's essential five characteristics of an essentially contested concept, but also to consider the extent to which it can be anchored.

The first condition Gallie outlines is that the concept must represent a value that is worth realising in practice.⁴⁹⁶ Subsequent writers have made considerable use of Gallie's theory to test a variety of concepts that are deemed values worth realizing in practice. So, for example Beck has argued in relation to Gallie's first condition that human rights clearly 'connote something valuable'.⁴⁹⁷ Waldron has argued in relation to Gallie's first condition that the rule of law 'is deployed by almost all of its users to enter a favourable evaluation of the regimes or situations to which it applies'.⁴⁹⁸ In terms of defining what the term 'essentially' refers to, Waldron has argued that it 'refers to the location of the disagreement or indeterminacy: it is contestation at the core not just at the borderlines or penumbra of a concept'.⁴⁹⁹ So, in the context of considering the rule of law as an essentially contested concept, Waldron has argued that the rule of law is a 'contestation about the content and requirements of the rule of law ideal, and there is contestation about its point'.⁵⁰⁰ Applying a similar approach, it can be argued firstly that examination of the literature concerning the EU's principle of subsidiarity reveals that the concept is worth pursuing. Kumm, for example stresses the constitutional role that subsidiarity plays in the protection of federalism in the EU.⁵⁰¹

The second and third conditions Gallie outlines is that to achieve in practice such a worthy aim the concept 'must be of an internally complex character' and points to various rival descriptions of the key tenets of the concept.⁵⁰² So, for example Beck argues that although human rights are internally complex as there are a 'variety of competing theories of the nature of rights',⁵⁰³ the important point he argues is that 'there is no settled criteria for deciding which of these attributes is essential, more important or correct, because there is no universally shared or

⁴⁹⁶ W.B.Gallie, 'Essentially Contested Concepts', (1956) *Proceedings of the Aristotelian Society* 167-98 at 171.

⁴⁹⁷ *Ibid.*, at 327.

⁴⁹⁸ Beck *Op.Cit.* at 154.

⁴⁹⁹ Beck *Op. Cit.* at 149.

⁵⁰⁰ Waldron *Op.Cit* at 159. See further B.Tamanaha, *On the Rule of Law: History, Politics, Theory*, (Cambridge University Press, 2004) for a more general discussion of the origins and theories of the rule of law.

⁵⁰¹ M.Kumm, (2006) 'Constitutionalising subsidiarity in Integrated Markets: the Case of Tobacco Regulation in the European Union' (12(4) *ELJ* 503-533.

⁵⁰² Gallie *Op Cit* 171.

⁵⁰³ Beck *Op.Cit.* at 328.

demonstrably correct definition of the concept of human rights in terms of its range of necessary and optional attributes.’⁵⁰⁴

Applying a similar approach, it can be argued that EU’s concept of subsidiarity satisfies the second and third criterion. Despite the importance of subsidiarity as a concept, the core meaning of the concept of subsidiarity is contested in light of various competing theories as to the nature of the concept in EU law and its function in the exercise by the EU law-making institutions when it shares competence with the Member States. The most contested issue here is the question of how to measure value of Union legislative action over and above national level legislative action.

On the one hand, some authors have focused on how the procedure of the substantive review should be formalized⁵⁰⁵ e.g. the process federalism of Berman. As he writes,

‘my basic view is that the Community should respond to this challenge by recasting subsidiarity from a jurisdictional principle (that is a principle describing the allocation of substantive authority between the Community and the Member States) into an essentially procedural one (that is a principle directing the legislative institutions of the community to engage in a particular inquiry before concluding that action at the Community rather than the Member States level is warranted).’⁵⁰⁶

Thus this would exclude judicial review of the actual merits of the inquiry by the CJEU.

On the other hand, other academics have focused more on a theoretical consideration of whether the Community should exercise a shared competence. This approach Schütze has termed as operating within a ‘philosophy of dual federalism’ by its focus on ‘whether the Community should exercise one of its competences’. This he points out is compatible with the distinction drawn between competence and subsidiarity in Article 5 TEU (1) and (2) and ‘will thus

⁵⁰⁴ Beck Op.Cit. 328.

⁵⁰⁵ R.Schütze, ‘Lisbon and the Federal Order of Competences: A Prospective Analysis’ (2008) 33 *EL Review* 709-722 at 527.

⁵⁰⁶ G.Berman, ‘Taking Subsidiarity seriously: Federalism in the European Community and the United States’, (1994) 94 (2) *Columbia Law Review* 335 at 326. See also Schutze Op Cit 527 and who argues that the Amsterdam Protocol was concerned with process federalism and I.Cooper, ‘The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU’, (2006) 44 *Journal of Common Market Studies* 281 at 288.

only make sense if the subsidiarity principle concentrates on the whether and how of the specific at issue. But the ‘whether’ and the ‘how’ of the specific action is inherently tied together’.⁵⁰⁷ Furthermore, examination of the literature on the question of whether subsidiarity can be operationalized is contested. On the one hand, Davies thinks that subsidiarity cannot be operationalized. For, as he argues, there is a flaw inherent in the use of subsidiarity as a guide to the exercise of competence when there are competing goals in a particular policy area. The flaw of subsidiarity that he identifies is that,

‘subsidiarity’s weakness is that it assumes the primacy of the central goal, and allows no mechanism for questioning whether or not it is desirable, in the light of other interests, to fully pursue this.....It takes as its starting point that all levels are united in wishing to achieve certain goals and that none has any other interests or objectives which conflict with these....’⁵⁰⁸

To put it another way, Davies questions the EU’s use of subsidiarity as a mechanism to guide the exercise of competence on the grounds of its only focus being the goal of market integration. Consequently, according to Davies, the EU’s use of subsidiarity as a mechanism to inform competence does not allow the EU to balance other fundamental goals of the EU against the goal of market integration. The question of how the CJEU uses subsidiarity when undertaking balancing fundamental goals in the context of the determination of EU citizens’ residency rights who are economically inactive will be considered further in chapters 4 and 5.

However, Davies’ point is open to criticism here given that the duty of loyal cooperation is now recognized to be reciprocal between the Member States and the EU.⁵⁰⁹ Furthermore, the Treaties now explicitly refer to the constitutional traditions of the Member States and most recently in Article 4 TEU. It is arguable that such a requirement also implicitly includes a shared set of objectives that both the Member States and the Union must respect.

⁵⁰⁷ Schütze Op Cit 533.

⁵⁰⁸ See G. Davies, ‘Subsidiarity: The wrong idea, in the wrong place, at the wrong time’, (2006) *Common Market Law Review* Vol 43 63-84 at 78.

⁵⁰⁹ Article 4 (3) TFEU. For a more general description of Article 4(3) TFEU and the principle of loyalty in EU law see M.Klamert, *The Principle of Loyalty in EU law*, (Oxford Studies in European Law, 2014).

Kumm, on the other hand, however thinks that subsidiarity can be operationalized. In particular, he explains how CJEU has undertaken a subsidiarity review is in the context of review of EU institutional action in the internal market context. In respect of the stages involved in undertaking a subsidiarity and proportionality review in the context of the internal market. Kumm suggests the following stages:-

Firstly, Kumm argues that a subsidiarity and proportionality review involves considering whether there should be a legitimate purpose for Union intervention explicitly stated and evidenced as required by Article 5(2) TEU i.e. whether the competence is being exercised for a proper reason or motive. The latter article requires that ‘the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by Member States...but rather, by reason of the scale or effects of the proposed action, be better achieved at the Union Level.’⁵¹⁰ Such a requirement related to the scale or effects of the proposed action are difficult, argues Kumm, for the CJEU to quantify in its judgement.⁵¹¹ It is also problematic for the CJEU in its reasoning when it comes to assessing at exactly what the level of difficulty was which in turn required Union intervention and ‘when can Member States not sufficiently achieve the relevant purpose?’⁵¹²

Secondly, Kumm argues, with reference to the *Tobacco Advertising* and *Working Time cases*,⁵¹³ that a subsidiarity and proportionality review involves considering whether that the Union internal market measure decided upon by the EU law-making institutions is the minimum necessary to deal with the problem identified.⁵¹⁴ This is a more practical and usable approach for the CJEU and one which the CJEU could adopt as well and refer to in its reasoning to demonstrate to the Member States’ courts that it had undertaken a meaningful subsidiarity and proportionality review of institutional law-making action.

Thirdly, Kumm argues that a subsidiarity and proportionality review involves considering the extent of the effect of a Union measure on autonomy of the Member State and the practical effect on the legal systems of the Member States

⁵¹⁰ Kumm Op.Cit. 519.

⁵¹¹ Kumm Op.Cit.520.

⁵¹² Kumm Op.Cit. 520.

⁵¹³ Case C-376/98 *Germany v Parliament and Council (Tobacco Advertising case)*; Case C-84/94 *UK v Council* [1996] ECR I-5755. For further discussion of these cases see sections 3.1 and 3.4 of chapter 3.

⁵¹⁴ Kumm Op.Cit. 521.

and that this should not be out of proportion to the result achieved by the Union measure.⁵¹⁵ This inevitably requires the CJEU to undertake a balancing test. But as Kumm points out, citing the example of the *Swedish Match* case⁵¹⁶, the CJEU has failed to undertake a balancing test.⁵¹⁷ As he writes,

‘even though Article 5 (3) specifically mentions the principle of proportionality in the context of the conferral of powers and the commitment to subsidiarity, the Court of Justice did not engage proportionality as part of the jurisdictional enquiry...it did not connect that analysis to the legitimate purpose of federal intervention.’⁵¹⁸

Nevertheless, despite the importance Kumm places on undertaking such analysis, Kumm does not consider how the CJEU should undertake such a balancing exercise or whether different policy areas require different considerations. Nor does he specify exactly what the criteria should be or what factors the CJEU should take into account when undertaking such a balancing exercise. This is a significant omission as ‘balancing represents a different kind of thinking. The focus is directly on the interests or factors themselves. Each interest seeks recognition of its own and poses a head to head comparison with competing interests’.⁵¹⁹ The existence of such theoretical debates from examination of the academic literature clearly fulfils Gallie’s second and third conditions for an essentially contested concept.⁵²⁰

The fourth condition Gallie outlines is that the realisation of such a worthy aim ‘must be of a kind that admits of considerable modification in light of changing circumstances and such modification cannot be prescribed or predicted in advance’⁵²¹ In respect of the latter condition, this can in the human rights context, Beck argues, be overcome by judges valuing one approach over another. Beck then argues that this is illustrated where courts are more willing to impose a positive obligation under some articles than others. So, for example, Beck explains how the ECHR judges have been more willing to impose positive

⁵¹⁵ Kumm Op.Cit. 522.

⁵¹⁶ Case C-210/03. *Swedish Match AB and Swedish Match UK Ltd. v. Secretary of State for Health*.

⁵¹⁷ Kumm Op.Cit. 522.

⁵¹⁸ Kumm Op.Cit. 523.

⁵¹⁹ T.Aleinikoff, ‘Constitutional Law in the Age of Balancing’, [1987] 96 Yale Law Journal 943 at 945.

⁵²⁰ Gallie Op.Cit. at 171-2.

⁵²¹ Gallie Op.Cit. at 171-2.

obligations under Article 8 concerning the right to privacy⁵²² than they are to accept positive dimensions of negative rights when discussing abortion and the right to freedom of information under Article 10 ECHR,⁵²³ thus leaving the exact specification of negative rights to be achieved over time.⁵²⁴

Applying a similar approach, it can be argued that the EU's concept of subsidiarity satisfies the fourth criterion. For a common theme running throughout much of the academic discussion highlighted in this chapter is the contestation at the core of what subsidiarity means. On the one hand subsidiarity has been argued to be a centralizing principle on account of its inherent centralizing function.⁵²⁵ Such a function Barber has argued is in direct opposition to that of 'national self-determination' which he argues 'ties political power to a national group – which may or may not map on to those affected by the power'.⁵²⁶ Consequently he concludes 'self-determination and subsidiarity present rival answers to the same question: where should the boundaries of the democratic unit be drawn'.⁵²⁷ However, such a view is questionable as arguably subsidiarity can be related to the idea of a defined political unit, as in the case of the EU, with the latter being able to influence a subsidiarity analysis when legislating with a view to either pushing towards centralisation or maintaining a respect for localism. Subsidiarity suggests there is a definite line to be drawn between levels of competence.

A fifth condition Gallie outlines is that there should be a contestation of the concept at its core and debates can be used either aggressively or defensively.⁵²⁸ In other words one can argue for or against a particular meaning of the core of the concept. This contestation has been argued to have a positive dimension. For, for example, Waldron has argued in the context of the concept of the rule of law that 'the contestation between rival conceptions deepens and enriches all sides

⁵²² Beck Op.Cit. at 328 citing *Von Hannover v Germany ECtHR*, 24 June 2004 (No. 59320/00) 40 EHRR 1.

⁵²³ Beck Op.Cit. 329 citing *Open Door and Dublin Well Women v Ireland ECt HR*, 29 October 1992 (No 14234/88), 15 EHRR 244.

⁵²⁴ Beck Op.Cit. 329.

⁵²⁵ Beck Op. Cit.323.

⁵²⁶ N.W.Barber, 'The limited Modesty of Subsidiarity', (2005) 11 (3) European Law Review 308-235 at 329.

⁵²⁷ Barber, N.W., 'The limited Modesty of Subsidiarity', (2005) 11 (3) European Law Review 308-235 at 329.

⁵²⁸ Gallie Op.Cit. at 172. See also see Waldron Op.Cit. who argued at 148-9 that Gallie's term essential 'refers to the location of the disagreement or indeterminacy; it is contestation at the core, not just at the borderlines or penumbra of a concept'.

understanding of the area of value that the contested concept marks out'.⁵²⁹ On the other hand, in the context of human rights, for example Beck has argued how the consequence of this is that such conceptual indeterminacy has favoured judicial discretion.⁵³⁰

Applying a similar approach, it can be argued that subsidiarity satisfies the fifth criterion. It is clear that the existence of the various approaches to subsidiarity has led to conceptual dissonance with such debate used both aggressively and defensively. On the one hand, support has been given for subsidiarity to be perceived as a political principle of process federalism⁵³¹ the latter principle having a focus on the procedural aspects of subsidiarity use. On the other hand, other academics have focused on a philosophy of dual federalism and its emphasis on the EU and the Member States being sovereign co-equals. This approach Schütze has termed as operating within a 'philosophy of dual federalism' by its focus on 'whether the Community should exercise one of its competences'. This he points out is compatible with the distinction drawn between competence and subsidiarity in Article 5 TEU (1) and (2) and 'will thus only make sense if the subsidiarity principle concentrates on the whether and how of the specific at issue. But the 'whether' and the 'how' of the specific action is inherently tied together'.⁵³²

Such academic theoretical debate on subsidiarity has therefore been used both aggressively in promoting the process federalist approach to subsidiarity as well as being defensive of the dual federalist approach and its emphasis on protection of national competence against federal competence.

Thus it is contended in this section that in light of literature which has highlighted how subsidiarity is contested as to its meaning and scope that subsidiarity clearly fulfils Gallie's criteria for being an essentially contested concept. The

⁵²⁹ Waldron Op.Cit at 152.

⁵³⁰ Beck Op.Cit. at 330.

⁵³¹ See for example G. Berman, "Taking Subsidiarity Seriously: Federalism in the European Community and the United States" (1994) 94 Columbia Law Review 331 at 336: 'My basic view is that the Community should respond to this challenge by recasting subsidiarity from a jurisdictional principle (that is, a principle describing the allocation of substantive authority between the Community and the Member states) into an essentially procedural one (that is, a principle directing the legislative institutions of the Community to engage in a particular inquiry before concluding that action at the Community rather than Member State level is warranted).'

⁵³² Schütze Op Cit 533.

implications of the conceptual dissonance that arises from subsidiarity being an essentially contested concept will be considered in a subsequent chapter. Such conceptual dissonance, it will be argued favours judicial discretion on how it should be applied. The question therefore arises as to how subsidiarity, as a contested concept should be anchored in EU law by the CJEU to help ensure the proper respect for the division of power between the EU and the Member States in areas of shared competence.

For by anchoring subsidiarity by using exemplars in order to demonstrate what is nearer to the heart of subsidiarity, this helps to minimise the risk of a dispute as to how it should be operationalized in adjudication. Such an approach would directly address a key concern raised by Gallie that essentially contested concepts are at continual risk of being disputed as well as providing a useful conceptual framework in this thesis for helping to identify the core of values of subsidiarity. This issue has particular importance in light of the recent renewed emphasis on subsidiarity in the Treaty of Lisbon to guide the EU law-making institutions when legislating in areas of shared competence to which the next section turns to consider.

6. Subsidiarity and the introduction of the yellow card procedure following the Treaty of Lisbon

The aim of this section is to explain how despite subsidiarity being an essentially contested concept that following the Treaty of Lisbon there is a renewed emphasis on the use of subsidiarity with its inherent respect for localism to guide the EU law-making institutions when legislating in areas of shared competence as evidenced by the introduction of the yellow card procedure.

For examination of the Lisbon Treaty reveals how it reinforces the requirement to adhere to the principle of subsidiarity⁵³³ where the EU shares competence in a particular policy area with the Member States. The relevant provision is Article 5 TEU (ex Article 5 TEC) with Article 5 (3) TEU providing that subsidiarity is only

⁵³³ P.Craig and G.de Búrca, *EU Law: Text, Cases and Materials*. (5th ed., Oxford: Oxford University Press, 2011) at 83 for a discussion of shared competence. In particular they write ‘the reality is that shared competence is simply an umbrella term, with the consequence that there is significant variation as to the division of competence in different areas of EU law’.

relevant where the EU shares competence with the Member States in respect of law-making. Article 5 (3) TEU, in conjunction with the Protocol on subsidiarity and proportionality,⁵³⁴ then sets out a test that the EU institutions should follow, that that if the Member States cannot exercise competence efficiently enough then the EU should take action.⁵³⁵ This reinforces a dual federalist approach.

For the first time and as part of the response to calls from the national Parliaments for more democratic legitimacy,⁵³⁶ the Protocol also requires the EU to provide justification for the use of subsidiarity as a mechanism to guide the exercise of competence by the EU.⁵³⁷ It requires the Commission⁵³⁸ to send with all draft legislative acts an explanation of how the proposal complies with subsidiarity not just to the Union institutions for scrutiny but also to the national Parliaments.⁵³⁹

In respect of the new ex ante monitoring role of the national Parliaments, the Lisbon Treaty reveals firstly how it reinforces the requirement to adhere to the principle of subsidiarity⁵⁴⁰ where the EU shares competence in a particular policy area with the Member States. The key provision is Article 5 TEU where the remit of subsidiarity monitoring is extended to include national level. The involvement

⁵³⁴ See also the Protocol on the application of the principles of subsidiarity and proportionality, Consolidated Texts of the EU Treaties as amended by the Lisbon Treaty, pages 204 to 207 (Cm 7310) and House of Commons European Scrutiny Committee ‘Subsidiarity, National Parliaments and the Lisbon Treaty’ Thirty-third Report of Session 2007–08 <<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/563/563.pdf>> last accessed 12.7.12. for discussion of this Protocol..

⁵³⁵ For a recent consideration of the application of the principles by the Institutions see Report from the Commission, Annual Report 2013 on Subsidiarity and Proportionality (2014) 505 final.

⁵³⁶ J.Mayoral, ‘Democratic improvements in the EU under the Lisbon Treaty, (2011) <<http://www.eui.eu/Projects/EUDO-Institutions/Documents/EUDOREport922011.pdf>> accessed 20.7.12. Craig Op.Cit. at 45-48 and p.72 for a discussion of how the Lisbon Treaty has improved EU democracy.

⁵³⁷ See also the Protocol on the application of the principles of subsidiarity and proportionality, Consolidated Texts of the EU Treaties as amended by the Lisbon Treaty, pages 204 to 207 (Cm 7310) and House of Commons European Scrutiny Committee ‘Subsidiarity, National Parliaments and the Lisbon Treaty’ Thirty-third Report of Session 2007–08 <<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/563/563.pdf>> last accessed 12.7.12. for discussion of this Protocol..

⁵³⁸ For further discussion of assessing the impact of Commission proposals see EC Impact Assessment Guidelines (2009) <http://ec.europa.eu/smart-regulation/impact/commission_guidelines/docs/iag_2009_en.pdf> last accessed 01.08.15.

⁵³⁹ Protocol on the application of the principles of subsidiarity and proportionality, Consolidated Texts of the EU Treaties as amended by the Lisbon Treaty, pages 204 to 207 (Cm 7310) article 5(3).

⁵⁴⁰ P.Craig and G.de Búrca, *EU Law: Text, Cases and Materials*. (5th ed., Oxford: Oxford University Press, 2011) at 83 for a discussion of shared competence. In particular they write ‘the reality is that shared competence is simply an umbrella term, with the consequence that there is significant variation as to the division of competence in different areas of EU law’.

of national Parliaments is widely regarded as crucial in helping to enhance democratic legitimacy of the EU legislative process in that national Parliaments are closer to the citizens of the EU.⁵⁴¹ For example, this point was raised very recently by the UK in the Review of the Balance of Competences between the United Kingdom and the European Union, Subsidiarity and Proportionality.⁵⁴² The exact wording of Article 5 TEU provides that,

‘Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level’.

In addition, Article 5 TEU (ex Article 5 TEC) in conjunction with Article 5 (3) TEU provides that subsidiarity is only relevant where the EU shares competence with the Member States in respect of law-making.⁵⁴³ Article 5 (3) TEU, in conjunction with the Protocol on subsidiarity and proportionality,⁵⁴⁴ then sets out a test that the EU institutions should follow, that that if the Member States cannot exercise competence efficiently enough then the EU should take action.

Under Article 2 of the Protocol on the application of subsidiarity and proportionality the Commission is required to undertake a consultation prior to proposing any legislation. In Article 5, the Commission is required to provide detailed written evidence as to how they have complied with the subsidiarity test including,

⁵⁴¹ H.M.Government, Review of the Balance of Competences between the United Kingdom and the European Union, Subsidiarity and Proportionality, (December 2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/388852/BoCSubAndPro_acc.pdf> accessed 12.1.15.

⁵⁴² Ibid at 28.

⁵⁴³ The wording in Article 5(3) TEU specifically relates to areas not within exclusive competence: ‘under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.’

⁵⁴⁴ See also the Protocol on the application of the principles of subsidiarity and proportionality, Consolidated Texts of the EU Treaties as amended by the Lisbon Treaty, pages 204 to 207 (Cm 7310) and House of Commons European Scrutiny Committee ‘Subsidiarity, National Parliaments and the Lisbon Treaty’ Thirty-third Report of Session 2007–08 <<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/563/563.pdf>> last accessed 12.7.12. for discussion of this Protocol..

‘some assessment of the proposal's financial impact and, in the case of a Directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation’ as well as ‘the reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators.’

Secondly, a new European Resolution further widens the subsidiarity monitoring to include regional and local levels of Member States by requiring national Parliaments to consult regional and local governmental bodies.⁵⁴⁵

Thirdly, Article 12b TEU, in conjunction with the Protocol on the application of subsidiarity and proportionality, sets out how the ex ante system for monitoring subsidiarity is to be operationalized through an early warning system. When this system is activated, the relevant instrument under review will be further scrutinised by the Commission, a group of Member States or the relevant EU institution with a view to either keeping, amending or rejecting outright with reasons a particular instrument. This is called the ‘yellow card’ procedure⁵⁴⁶ and the innovative setting up of such an ex ante review procedure illustrates how it is possible to anchor subsidiarity sufficiently at a procedural level to operationalize subsidiarity as a principle of EU law procedurally⁵⁴⁷ although, as Craig and de Búrca point out, national Parliaments are only afforded a role in relation to

⁵⁴⁵ European Parliament Resolution of 13 September 2012 on the 18th Report on better legislation – Application of the principles of subsidiarity and proportionality 2010.

⁵⁴⁶ See further the attached Protocol 1 and Declaration 51 on the role of national parliaments and an updated Protocol 2 on subsidiarity and proportionality to the Treaty of Lisbon and <<http://en.euabc.com/word/879>> accessed 21.8.14. where it is stated that as a result of the Lisbon Treaty ‘since 15 September 2006 the Commission has send all proposals for new laws to the national parliaments to give them a chance to read the proposals for compliance with the principle of subsidiarity. This practice is now a legal obligation. The Commission is obliged to review its position if 1/3 of the national parliaments react with subsidiarity arguments. The Commission is not obliged to change its proposal. The procedure is called the “yellow card”. The Lisbon Treaty also includes an “orange card”. 50% of the Parliaments can ask 55% of the governments to block a proposal from the Commission. This procedure may never be used. A qualified majority will anyway require the support of 55% of the governments. This means that 45% of the governments can block a proposal for whatever reason’.

⁵⁴⁷ See more generally R. Schütze, ‘Lisbon and the Federal Order of Competences: A Prospective Analysis’. *European Law Reveiw* 33(5): 709-722. For an example of the use of the yellow card procedure see Observer article ‘National Parliaments show yellow card on EU law right to strike’ <<http://euobserver.com/social/116405>> accessed 23.6.13; the Communication from the Commission to the European Parliament, the Council and the National Parliaments on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office with regard to the principle of subsidiarity, in accordance with regard Protocol No 2 <<http://www.ipex.eu/IPEXL-WEB/search.do>> accessed 5.1.14.

subsidiarity not proportionality.⁵⁴⁸ Wetherill too is critical of this omission on the grounds that the two principles are closely connected in this context.⁵⁴⁹ Nevertheless, this new procedure does create a new role for national Parliaments in the subsidiarity assessment⁵⁵⁰ as national Parliaments will now be able to challenge proposed EU action in shared competence areas on the grounds of breach of subsidiarity. As Dougan explains, ‘with such a wealth of material, argumentation over subsidiarity could metamorphose from the politically subjective into the readily justiciable.’⁵⁵¹ However, the requirement of subsidiarity in EU law-making in shared areas of competence is only as strong as the degree of intensity of the CJEU’s judicial review of EU action. In the past the CJEU has shown a rather soft approach in its judicial review in assessing whether the EU has provided sufficient justification that the EU is best placed to take legislative action, which is considered further in chapter 3 of this thesis. It remains to be seen whether the level of intensity of CJEU judicial review of the institutional use of subsidiarity in EU law-making in shared areas of competence will become stronger following the Treaty of Lisbon.⁵⁵²

So far there have only been a few examples of the use of the yellow card procedure⁵⁵³ but the most notable example of this is the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office following reasoned opinions submitted by the national authorities.⁵⁵⁴ Here

⁵⁴⁸ P.Craig and G. de Búrca, *EU Law: Texts, Cases and Materials*, (OUP, 2012) at 97.

⁵⁴⁹ S.Wetherill, ‘Better Competence Monitoring’, (2005) 30 *European Law Review* 23.

⁵⁵⁰ See also Report from the Commission, Annual Report 2013 on Subsidiarity and Proportionality (2014) 505 final and the Draft opinion of the Committee on Constitutional Affairs for the Committee on Legal affairs on the annual reports 2012-2013 on subsidiarity and proportionality (2014/2252(INI)) where in the paras 3 and 4 of the latter draft opinion Rapporteur K.Ujazdowski calls for national Parliaments to be given both more detailed guidelines about issuing reasoned opinions as well as an increase in the time that national Parliaments have to review the relevant instrument.

⁵⁵¹ See also how the CJEU more recently in the case of Case C-491/01 *ex parte British American Tobacco* [2002] ECR I-11453 has explicitly considered if a particular Directive is invalid by reason of infringement of subsidiarity. This is in contrast to its previous approach in the earlier cases of Case C-84/94, *UK v. Council* [1996] ECR I-5755 and Case C-233/94, *Germany v. EP and Council* [1997] ECR I 2427.

⁵⁵² See further the Report from the Commission, Annual Report 2013 on Subsidiarity and Proportionality (2014) 505 final where it is noted at 6 that in 2013 ‘the CJEU did not render any key judgments on the principle of subsidiarity’.

⁵⁵³ H.Brady, ‘The EU’s yellow card comes of age: Subsidiarity unbound’, 12.11.13 <<http://www.cer.org.uk/insights/eus-yellow-card-comes-age-subsidiarity-unbound#sthash.ucHgsJSY.dpuf>>accessed 4.1.14.

⁵⁵⁴ Communication from the Commission to the European Parliament, the Council and the National Parliaments on the review of the proposal for a Council Regulation on the establishment

the Commission following analysing the reasoned opinions submitted by the national authorities with regard to the principle of subsidiarity, in accordance with Protocol No 2, and set out in a communication their response to the concerns raised by the national Parliaments in respect of the proposal on the establishment of a European Public Prosecutor's Office.⁵⁵⁵ Their communication commenced with the Commission setting out a few preliminary points. In particular, it is to be commended that they distinguished between arguments relating to the principle of subsidiarity and those relating to proportionality or policy choices unrelated to subsidiarity as well as giving concrete example of arguments which fall outside of the scope of the subsidiarity control mechanism. These included:-

‘the Regulation is too far-reaching; the European Public Prosecutor's Office's powers are too far-reaching and should be reserved to national authorities; the Regulation goes beyond what is necessary to achieve its objective; the Regulation may violate the protection of fundamental rights guaranteed by the Czech Constitutional and the Charter; the Regulation would create disadvantages for Member States in that they lose the capacity to prioritise prosecution activities within their own criminal justice systems; Article 26 of the proposal contains investigation measures which are not allowed under national law in all Member States and this may undermine the effective protection of the rights of suspects.’⁵⁵⁶

It is also to be welcomed that the Commission then addressed in turn the arguments raised by the national Parliaments that relate specifically to subsidiarity as well as giving their reasons for rejecting the arguments raised by the national Parliaments.⁵⁵⁷ First the Commission considered the argument raised by the national Parliaments that it had not sufficiently explained its reasons as to why the particular proposal at issue here was compatible with the principle of subsidiarity. It also considered that the argument raised that the Commission had conflated its consideration of insufficiency of member State action with the requirement of added-value of Union action.⁵⁵⁸ In response to this, the Commission emphasised

of the European Public Prosecutor's Office with regard to the principle of subsidiarity, in accordance with Protocol No 2, COM (2013) 851 final.

⁵⁵⁵ Ibid.

⁵⁵⁶ Ibid., para 2.1.

⁵⁵⁷ Ibid., para 2.1.

⁵⁵⁸ Ibid.

that they had given detailed consideration to the relevant Impact Assessments. They then disagreed that they had failed to explain sufficiently its reasons submitting that,

‘the explanatory memorandum and the accompanying legislative financial statement of the Commission sufficiently explain why the action of the Member States is insufficient with regard to the policy objective and why Union action would better achieve that objective (e.g. lack of continuity in enforcement action and lack of an underlying common European prosecution policy)’.⁵⁵⁹

Secondly, the Commission considered and rejected the arguments put forward by a number of national Parliaments that ‘investigation and prosecution action at Member State level is sufficient and that the coordination and investigation mechanisms existing at the Union level is sufficient and that the coordination and investigation mechanisms existing at the Union level (Eurojust, Europol and OLAF) would also be sufficient’.⁵⁶⁰ In particular the Commission referred to statistical evidence that shows ‘that the Treaty objective of an effective, deterrent and equivalent level of protection is not achieved in general’ and that ‘there is a solid basis of statistical evidence demonstrating that in general terms the action taken at Member State level in the specific area of Union fraud is insufficient’.⁵⁶¹ The use of supporting statistical evidence from OLAF here, though, is brief and cursory and limited to statistical evidence submitted by OLAF.⁵⁶² It is submitted

⁵⁵⁹ Ibid.

⁵⁶⁰ Ibid., para 2.3.

⁵⁶¹ Ibid.

⁵⁶² Ibid., ‘The analysis of OLAF’s annual statistics indicates that national criminal proceedings are not effective as they last too long. In a period of five years between 2006-2011, the number of actions¹² in which no judicial decision in the Member States had yet been taken was at 54,3%.¹³ The OLAF statistics further demonstrate that there is a lack of deterrence. In the same period more than half of actions transferred by OLAF to the judicial authorities of the Member States were dismissed before trial¹⁴ and the average conviction rate remained low (42,3%). These data relate to cases in which OLAF already took the decision that the received information justified the opening of an investigation and also carried out its preliminary investigation. Finally, according to the statistical data available to OLAF, the degree of successful prosecution varies from Member State to Member State therefore, leading to a lack of equivalence of the protection of the Union’s financial interests across the Member States. From 2006-2011, conviction rates of actions transferred by OLAF to Member States’ judicial authorities ranged from 19,2% to 91,7% (not including Member States with rates of 0% and 100%).¹⁵ Therefore, contrary to the opinions of some national Parliaments (CZ Senát, NL Eerste Kamer and Tweede Kamer, UK House of Commons), which question the data provided by the Commission, there is a solid basis of statistical evidence demonstrating that in general terms the action taken at Member State level in the specific area of Union fraud is insufficient’.

that the Commission should have given more consideration of a wider range of statistical data and examples to illustrate that action taken at Member State level is insufficient.

Thirdly, the Commission considered and disagreed with the argument put forward by a number of national Parliaments questioning the added-value of the proposal. This was on the grounds that there ‘were significant improvements expected to come from a common Union-level prosecution policy’ and that ‘the proposal tackles a number of important practical and legal issues’.⁵⁶³ Here the citing by the Commission of concrete examples by way of illustration of these practical and legal issues is to be commended.

Finally, the Commission considered and rejected concerns raised by a number of national Parliaments that the nature and scope of the competences of the proposed European Public Prosecutor’s Office are compatible with the principle of subsidiarity.⁵⁶⁴ In particular, in respect of the scope and competence in relation to Article 86 TFEU, the Commission considered that this was ‘the most effective way of ensuring a consistent investigation and prosecution policy across the Union and to avoid parallel action at Union and national level, which would lead to duplication and a waste of precious resources. Also, without at least knowing of all cases, it would be difficult for the European Public Prosecutor’s Office to identify cross-connections between suspects and cases in different Member States. Limiting its competence to some cases, e.g. serious or cross-border cases, would not only reduce its added-value but also call into question the Union’s competence in this matter.’⁵⁶⁵ Consequently, the Commission concluded that ‘its proposal complies with the principle of subsidiarity enshrined in Article 5(3) TEU and that a withdrawal or amendment of that proposal is not required.’⁵⁶⁶ On balance, despite the somewhat brief and cursory use in places of supporting statistical evidence from OLAF, the Commission in this communication is to be commended identifying the arguments raised by the national Parliaments that relate specifically to subsidiarity as well as supporting its reasons for rejecting the arguments raised by the national Parliaments with reference to relevant statistical

⁵⁶³ Ibid.

⁵⁶⁴ Ibid., para 2.5.

⁵⁶⁵ Ibid.

⁵⁶⁶ Ibid., para 3.

analysis.⁵⁶⁷ The innovative setting up of such a procedure *ex ante* review procedure illustrates how it is possible to anchor subsidiarity sufficiently to operationalize subsidiarity as a principle of EU law at a procedural level even though the Commission's response in this instance could have more fully justified its response. For example, it could have undertaken a greater consideration of supporting statistical evidence and clarifying more precisely how such evidence has impacted on its final conclusion regarding added value that the introduction of a European Public Prosecutor would bring. It could also, as Conway points out, have addressed more specifically the concerns raised by the national Parliaments.⁵⁶⁸

A further important innovation is that the Lisbon treaty strengthens the idea of protecting local identities. For the Lisbon Treaty has enhanced the old Article 6(3) TEC by including a revised Article 4(2) TEU which requires the Union to respect not only the national identity of Member States but also the political, constitutional and legal regimes of those Member States. The placing of this provision between the principle of conferral and the principle of sincere co-operation at the outset of the TEU emphasises the central importance of such a principle in EU law. Furthermore, such a development has been the subject of academic speculation as to how the existence of the national identity clause in the TEU might inform the constitutional relationship between the EU and its Member States⁵⁶⁹ with Leczykiewicz considering how the idea of protecting local identities has been utilised by the CJEU in its case law. So, for example, she explains how the German Federal Constitutional Court in the Lisbon judgment has viewed Article 4(2) as 'recognition of a national constitutional court's power to safeguard

⁵⁶⁷ Ibid., para 2.1.

⁵⁶⁸ G.Conway, Article 69 TFEU in Smith & Herzog *Law of the European Union* (Lexis-Nexis (18th ed 2014).

⁵⁶⁹ B.Guastafarro, 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause', (2012) Jean Monnet Working Paper 1/12 <<http://centers.law.nyu.edu/jeanmonnet/papers/12/documents/JMWP01Guastafarro.pdf>> accessed 24.4.13. See also M.Kumm and his argument that 'Europeans will not become constitutional patriots any time soon' in M.Kumm, 'Why Europeans will not embrace constitutional patriotism', (2008) 6(1) *International Journal of Constitutional Law* 117-136.

national constitutional identity by carrying out review of EU acts by that court (the Lisbon judgement)'.⁵⁷⁰

On the other hand, Leczykiewicz also explains how the national identity clause has been of relevance in the context of the Member States' derogations from EU law and how Article 4(2) TEU was used as an element of a proportionality review in the case of *Sayn-Wittgenstein*.⁵⁷¹ For the CJEU held that 'in the context of Austrian constitutional history, the law on the abolition of the nobility, as an element of national identity, may be taken into consideration when a balance is struck between legitimate interests and the right of free movement of persons recognised under European Union law'.⁵⁷² However, the proportionality test employed by the CJEU was a cursory one with, as Besselink has pointed out, 'the only argument used to conclude to the proportionality of the Austrian rule of constitutional law was the reference to Article 4(2) itself'.⁵⁷³

Nevertheless, the existence of the national identity clause and its respect for Member States legal regimes holds considerable potential for the CJEU to make greater use of this clause to inform and support its reasoning. This is particularly so when undertaking a subsidiarity review where proportionality is treated as an aspect of subsidiarity applied to competences.⁵⁷⁴ This will be considered further in chapter 3.

⁵⁷⁰ See D.Leczykiewicz, 'The national identity clause in the EU treaty: a blow to supremacy of Union law', <<http://ukconstitutionallaw.org/2012/06/21/dorota-leczykiewicz-the-national-identity-clause-in-the-eu-treaty-a-blow-to-supremacy-of-union-law/>> accessed 23 April 2013. Judgement of 30 June 2009, 2BvE 5/08 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09 and general discussion of this case by P.Kiiver, 'The Lisbon Judgement of the German Constitutional Court: A Court-Ordered Strengthening of the National Legislature in the EU', (2010) 16 (5) European Law Journal 578-588.

⁵⁷¹ Case C 208/09 22 December 2010, *Ilonka Sayn-wittgenstein v Landeshauptmann von Wien*. See also F. Besselink, 'Respecting Constitutional Identity in the European Union: An Essay on CJEU (Second Chamber) Case C 208/09 22 December 2010, *Ilonka Sayn-wittgenstein v Landeshauptmann von Wien* Jan 9 2012 Common Market Law Review, Forthcoming Available at SSRN:< <http://ssrn.com/abstract+2002042> >accessed 1.3.12.

⁵⁷² F. Besselink, 'Respecting Constitutional Identity in the European Union: An Essay on CJEU (Second Chamber) Case C 208/09 22 December 2010, *Ilonka Sayn-wittgenstein v Landeshauptmann von Wien* Jan 9 2012 Common Market Law Review, Forthcoming Available at SSRN:< <http://ssrn.com/abstract+2002042> >accessed 1.3.12. at 17.

⁵⁷³ Ibid at 17.

⁵⁷⁴ M.Kumm, (2006) 'Constitutionalising subsidiarity in Integrated Markets: the Case of Tobacco Regulation in the European Union' (12(4) ELJ 503-533 at 531.

7. Conclusion

This chapter has explained how since its inception, a guiding principle for the EU is that it only has the competence⁵⁷⁵ or the power to act that has been conferred on it by the Treaties.⁵⁷⁶ For although the explicit inclusion of the principle of conferral was only included in the Treaty of Maastricht,⁵⁷⁷ it was implicit in the debate over who are the masters of the Treaties.⁵⁷⁸ In respect of the different types of competence, currently, although the TFEU refers to three categories of competence in Article 5 TFEU,⁵⁷⁹ the focus of this discussion is in relation to Article 3(2) TEU where the EU shares competence with the Member States. This provides that ‘The Member States will only be able to exercise this shared competence if the EU has not exercised its competence to act or if the EU has ceased to exercise its competence’. It is in this specific context where the EU has competence to act that Article 5 TEU provides that the EU must observe the principles of conferral, subsidiarity and proportionality.⁵⁸⁰ All three of these principles are also conceptually linked. Furthermore, all three principles succeed each other and as Kumm argues, all these principles have a central constitutional role in the protection of federalism values in the EU: they decide the balance of authority and power.⁵⁸¹ However, although all three succeed each other in the Treaty, they also point towards a role in balancing the two opposing forces of centralisation and decentralisation.

⁵⁷⁵ For further discussion of the definition of power or competence see Wesley Hohfeld’s definition of power or competence as the capacity or amenity to change legal relations: W. Hohfeld, ‘Some Fundamental Legal Conceptions As Applied in Judicial Reasoning’, 1913-14 23 *Yale LJ* 16-59 at 55

⁵⁷⁶ For further discussion see K.Alter, ‘Who are the Masters of the Treaty? European Governments and the European Court of Justice’, (1998) 52 *International Organization* 121-147.

⁵⁷⁷ Article 3b Treaty of Maastricht 7.2.92.

⁵⁷⁸ See for egs K.Alter, ‘Who are the Masters of the Treaties: European Governments and the ECJ’, <http://aei.pitt.edu/2434/1/002500_1.pdf> accessed 14.1.14.

⁵⁷⁹ Firstly in Article 3 TFEU there is exclusive competence. There is also in Article 2 (3) TFEU and Article 2 (5) TFEU two further categories of competence which R.Schütze, ‘Lisbon and the federal order of competences: a prospective analysis’, (2008) *European Law Review*, 3, refers to as co-coordinating competence and complementary competence. For a more general discussion on competence in the EU see Dashwood, ‘The Limits of European Community Powers’, (1996) 21 *European Law Review* 113-128 and S.Wetherill, ‘Competence creep and competence control’, (2001) 4 23 *Yearbook of European Law* 1-55: House of Lords European Union Tenth Report (2008), chapter 2, paragraph 21.

⁵⁸⁰ The wording of Article 5 applies to non-exclusive competences. Subsidiarity is most important re shared competences because of the major impact of the latter – when exercised, shared competence eliminates Member State competence in the same area.

⁵⁸¹ M.Kumm, (2006) ‘Constitutionalising subsidiarity in Integrated Markets: the Case of Tobacco Regulation in the European Union’ (12(4) *ELJ* 503-533 at 531.

A key purpose for the introduction of Article 5 TEC into EU law-making in shared competence areas was to help quell the fears of the Member States of too much incursion on the part of the EU.⁵⁸² Thus, in particular with regard to the use of subsidiarity in EU law-making, Article 5 TEC made it clear that subsidiarity must be considered only in relation to areas which do not fall within the exclusive competence of the Community.

The key argument of this chapter has been to explain how despite subsidiarity being a key constitutional concept in EU law making for mediating the balance of power between the EU and the Member States, it is also an essentially contested concept with reference to Gallie's theory of essentially contested concepts.

Furthermore, in section 3 it is explained how proportionality has been recognised both as a general principle of EU law as well evidenced in practice from the reasoning of the CJEU.⁵⁸³ Examination of a selection of well documented CJEU case law on proportionality in section 3, though, revealed that there is a considerable variety in the degree of intensity and application by the CJEU of proportionality tests as well as differences in the amount of guidance it gives to the Member States in this context. In addition, and as Jans has outlined, it was explained in section 3 that there are other contested issues involved in a proportionality review. So, for example, whether the national measure is disproportionate in relation to the restriction to intra Community trade and is out of proportion with the result achieved.⁵⁸⁴ For the CJEU in considering whether the national measure is disproportionate in relation to the restriction to intra Community trade and is out of proportion with the result achieved necessarily involves the CJEU in weighing up the conflicting interests at play.⁵⁸⁵ It is the most challenging characteristic of the proportionality review, argues Jans, in that

⁵⁸² P.Craig and G.de Búrca, *EU Law Text, Cases and Materials*, (3rd ed. OUP., 2003) at 132 and who write 'For those who feared further movement to some species of federalist Community the concept of subsidiarity was the panacea designed to halt such centralizing initiatives'.

⁵⁸³ See Case 11/70 *Internationale Handelsgesellschaft mBH v Einfuhr und vorratsstelle für Getreide und Futtermittel* where the CJEU found that the EC regulatory measures were proportionate and consequently not infringing the right to property. See also T.Inge Harbo, 'The Function of the Proportionality Principle in EU Law', (2010) 16(2) *European law Journal* for a discussion of the function of the proportionality principle as a general principle of law in terms of securing legitimacy for judicial decisions; G. de Búrca, 'The Principle of Proportionality and its Application in EC Law', in (1993) 13 *Yearbook of European Law* 105–150,

⁵⁸⁴ Jans Op.Cit at 241 and a discussion of the few examples of the CJEU's case law in this context at 248-252 where the 'Court has explicitly formulated the proportionality as an obligation to balance interests.

⁵⁸⁵ Jans Op.Ci.t at 241 points out, that express references to balancing interests by the CJEU are extremely rare 248.

it raises constitutional implications. For the CJEU has to review whether the national measure at issue in a case, and which poses a restriction to Community law is out of proportion with the result achieved and ‘the more intensive the Court of Justice’s scrutiny of national restrictions in light of the proportionality principle, the greater the shift in powers from the national legislatures to the European judiciary.’⁵⁸⁶ The more intensive the scrutiny by the CJEU of national restrictions the closer this comes to the CJEU’s approach to proportionality being merit-based.

In light of the discretion involved in the CJEU undertaking a proportionality review, there is also the question of whether the CJEU well placed to engage in an assessment of the complex normative and empirical questions that a proportionality review requires? This is an important question. For the use of proportionality by the CJEU needs to be accompanied by a clear, consistent and principled approach to its content and structure in order to provide a clear doctrinal test that the CJEU can utilise in its case law. This relates to the rule of law principles of certainty and predictability.⁵⁸⁷ In particular, the CJEU is required to give reasons and justify in its ruling following assessment of both the empirical and normative dimensions of a proportionality review to ensure the legitimacy of its decision. It also has to convince the national courts of the validity of its ruling in light of the supervisory role the national court has over the CJEU. For the CJEU relies on the national court not just for questions raised through the preliminary reference but also for the national court to give effect to the CJEU’s preliminary ruling.

Ultimately, the national court can in principle refuse to give effect to the CJEU’s preliminary ruling, although this does not happen in practice. Nevertheless, the more contestable the balancing approaches of the CJEU the more it feeds into doubts at national level about accepting supremacy.⁵⁸⁸ Consequently, in light of the immense use of proportionality in EU law⁵⁸⁹ as well as the different levels of

⁵⁸⁶ Jans Op.Cit. at 242.

⁵⁸⁷ See further B.Tamanaha, B., *On the Rule of Law: History, Politics, Theory*, (Cambridge University Press, 2004).

⁵⁸⁸ See also P.Craig and G. de Búrca, *EU law Cases and Materials*, (5th ed., OUP, 2011) pages 272- 283 for a discussion of German case law regarding the reluctant acceptance of supremacy of EU law and the limits laid down in that case law.

⁵⁸⁹ Ibid., who writes ‘that the principle is invoked by litigants more often than any other general principle of Community law’.

intensity of review adopted by the CJEU in different contexts and the imminent accession of the EU to the ECHR⁵⁹⁰ there is an even more pressing need to consider whether there is a need for a single proportionality test and for the justification of whatever proportionality test is in fact adopted.

⁵⁹⁰ Council of Europe, Accession of the EU to the European Convention on Human Rights, <http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/default_en.asp> accessed 14.1.14.

Chapter 3

Should subsidiarity and proportionality as twin constitutional principles in EU law-making, bind the CJEU as law- maker in its interpretation of shared competence areas and, if so, what can be agreed at European level?

Contents

1. Introduction

2. Subsidiarity and judicial review by the CJEU of the political institutions

2.1. Introducing the CJEU: a unique supranational court

2.2. The CJEU: its pro-union interpretative tendency and accusations in the literature of activism

2.3. Subsidiarity and judicial review by the CJEU of the political institutions

3. How to apply Kumm's argument that the CJEU should operationalize subsidiarity by employing subsidiarity and proportionality applied to competences as a tool of judicial review

4. Academic support that the CJEU as a law-making institution should be bound by subsidiarity when reviewing cases in the context of the common market.

5. Is it possible to identify more fully ex ante criteria for the application of subsidiarity thereby enabling the CJEU to engage more meaningfully with subsidiarity in its judicial reasoning in areas of shared policy outside of judicial review?

6. Conclusion

1. Introduction

The purpose of this chapter is to consider whether subsidiarity and proportionality, as twin constitutional principles in EU law-making, bind the CJEU as law- maker in its interpretation of cases in shared competence areas and,

if so, what criteria can be agreed at European level and whether each shared policy area requires different criteria to be taken into account by the CJEU?

The chapter introduces in section 2.1 the Court of Justice of the European Union (the CJEU) as a unique law-making institution which differs from international courts in the extent of its compulsory jurisdiction and from national courts in that they are not necessarily entitled to the same degree of deference by the CJEU that a national political-law-making institution has such as in the UK. It then highlights in particular firstly how in academic literature the CJEU has been subject to considerable criticism on the grounds that the CJEU has frequently in its interpretation in a variety of policy contexts gone beyond the meaning of the wording of the texts of the Treaties agreed by the Member States and, thus, that it has gone beyond their intentions.⁵⁹¹ Secondly, academic literature is considered which has pointed out that textual interpretation is also more open to manipulation because of the issue of varying levels of generality which facilitates judicial discretion⁵⁹² and enables the CJEU to display a pro-Union interpretative tendency. Even if there was no change in the ultimate case outcome the consideration of a subsidiarity and proportionality review in the CJEU's reasoning would help to enhance the legitimacy of the CJEU.⁵⁹³ The question is then posed that if the CJEU were to utilise subsidiarity in its reasoning could this help to counter claims that the CJEU displays an unjustified emphasis in its case law on the need to pursue an 'ever closer Union.' For this deprives Member States of their competencies and is at the expense of the legal systems of the Member States?⁵⁹⁴ It would also be consistent with the national identity clause in Article 4 (2) TEU. This provides that,

'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and

⁵⁹¹ See for example P.Neill, *The European Court of Justice: A Case Study in Judicial Activism* (London: European Policy Forum, 1995); T.Hartley, 'The European Court, Judicial Objectivity and the Constitution of the European Union', (1996) 112 *Law Quarterly Review* 95-109 at 95.

⁵⁹² See for example M.Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (OUP, 2004) at 288.

⁵⁹³ N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308.

⁵⁹⁴ Ibid.

safeguarding national security. In particular, national security remains the sole responsibility of each Member State'.⁵⁹⁵

The wording 'in particular' here indicates that national identity and functions or competences are more generally respected, including in spheres other than national security.

Such an inherent respect for localism also points towards the limits of competence of the EU in the Treaties. For the notion of competence, which Spaak argues is one of the fundamental modes of legal regulation⁵⁹⁶, from both a legal and a theoretical perspective is a normative concept.⁵⁹⁷ As Spaak further explains, 'to have competence is to have a hypothetical possibility to change legal positions by performing a specific kind of act'.⁵⁹⁸ It follows, therefore, that where there is no such legal power vested in that person or body, any legislative or policy action emanating from that person or body can be deemed invalid. Consequently, competence and validity are inexorably linked at a conceptual level when considering whether a particular rule or policy decision can hypothetically be made by a particular body or person. For as Spaak explains, 'we need a concept of competence precisely in order to be able in an adequate way, to analyze and discuss questions concerning (in)validity'.⁵⁹⁹ Validity is also an important in demonstrating constitutional legitimacy through evidencing that the EU law-making institution is acting within the powers conferred upon it by the Treaty and complying with the rule of law as entailing government under the law.

With this important conceptual link between competence and validity in mind, a review of the position of existing key case law regarding subsidiarity with reference to relevant academic critique in section 2.3 will be undertaken. In particular, it will be pointed out how this reveals that the CJEU has been prepared to undertake a subsidiarity review in respect of the actions of the political institutions in the context of law-making. Section 4 then revisits and agrees with literature by de Búrca and others that, in particular in light of the Treaty of Lisbon

⁵⁹⁵ For further discussion of the identity clause see D.Leczykiewicz, 'The national identity clause in the EU Treaty: a blow to supremacy of Union law?', <http://ukconstitutionallaw.org/2012/06/21/dorota-leczykiewicz-the-national-identity-clause-in-the-eu-treaty-a-blow-to-supremacy-of-union-law/>> accessed 10.5.13

⁵⁹⁶ T.Spaak, 'Norms that Confer Competence', (2003) 16(1) Ratio Juris 89-104 at 90.

⁵⁹⁷ Ibid., at 91.

⁵⁹⁸ Ibid.

⁵⁹⁹ Ibid.

the CJEU as a law-making institution should be bound by subsidiarity when interpreting in areas of shared competence.

On the other hand, in section 3 it will be explained first how Kumm treats proportionality as an aspect of subsidiarity applied to competences.⁶⁰⁰ Building on this argument, he then proposes a subsidiarity and proportionality test that the CJEU should employ in the context of the internal market. Such a test, he argues, should include three requirements: 1. Legitimate purpose, 2. necessity, 3. proportionality.⁶⁰¹ He does not, however, give much detail as to how the CJEU should undertake a subsidiarity and proportionality review in practice or specify how the CJEU should undertake a subsidiarity and proportionality review involving a balancing exercise or whether different policy areas require different considerations. Nor does he specify exactly what the criteria should be, whether each shared policy area requires different criteria to be taken into account or what factors the CJEU should take into account when undertaking such a balancing exercise.

This is problematic as it was argued in chapter 2 that subsidiarity is an essentially contested concept using Gallie's theory of essentially contested concepts.⁶⁰² Such conceptual dissonance, it was argued, favours judicial discretion on how it should be applied.⁶⁰³ Consequently, it was concluded that there is a compelling argument for judicial reasoning to engage more fully with how the CJEU should deal with such dissonance. The inclusion of an explicit explanation of how the CJEU had considered subsidiarity in the CJEU's reasoning would help to improve the quality of the reasoning of the CJEU and consequently enhance the legitimacy of

⁶⁰⁰ M.Kumm, 'Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union', (2006) 12(4) *European Law Journal* 503-533 at 505.

⁶⁰¹ Ibid and who writes at 519 'federal intervention has to further legitimate purposes, has to be necessary in the sense of being narrowly tailored to achieve that purpose, and has to be proportionate with regard to costs or disadvantages relating to the loss of Member States' regulatory autonomy'.

⁶⁰² W.B.Gallie, 'Essentially Contested Concepts', (1956) *Proceedings of the Aristotelian Society* 167-98.

⁶⁰³ For further discussion on literature which highlights out disagreement and dissonance are present in the law more than judicial reasoning sometimes suggests and calls for judicial reasoning to engage more fully with such disagreement and dissonance see for example J.Waldron, *Law and Disagreement* (Oxford University Press, 1999), C.Finkelstein, 'Introduction to the Symposium on conflicts of Rights', (2001) 7(3) *Legal theory* 235-238; J.Waldron, 'Security and Liberty: The Image of balance', (2003) 11(2) *Journal of Political Philosophy* 191-210.

the CJEU's ruling.⁶⁰⁴ This relates to the import of ensuring the persuasiveness of the CJEU to its audiences as an aspect of the rule of law for the rule of law enjoins obedience of the law.⁶⁰⁵ It also enhances the credibility of the CJEU as a guardian of competences in the eyes of the Member States in light of the growing concern of the competence creep of the EU institutions⁶⁰⁶.

This begs the question of how subsidiarity, as a contested concept, could be anchored in EU law by the CJEU to help ensure the proper respect for the division of power between the EU and the Member States in areas of shared competence and what could be agreed upon at European level and whether it should be sector specific. The possibility of anchoring is important in defending the criticisms directed at Gallie's theory that it results in conceptual relativism⁶⁰⁷, whereby the usefulness and determinacy of a concept is fatally undermined through the possibility of interminable contestation. For by anchoring subsidiarity by using exemplars in order to demonstrate what is nearer to the heart of subsidiarity, this helps to minimise the risk of a dispute as to how it should be operationalized in adjudication, i.e. that it has an objective, apolitical character. This is important as one of the criticisms of subsidiarity is that it is too political to be justiciable.⁶⁰⁸ Furthermore, such an approach would directly address a key concern raised by Gallie that essentially contested concepts are at continual risk of being disputed. It would also provide a useful conceptual framework in this thesis for helping to identify the core of values of subsidiarity, the latter being a key constitutional principle alongside proportionality in EU law-making for mediating the balance of power between the EU and the Member States in areas of shared competence. Such an approach allows for a more developed understanding of how the political dimension of subsidiarity, which some authors have been keen to emphasise and

⁶⁰⁴ N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.'

⁶⁰⁵ B.Tamanaha, *On the Rule of Law: History, Politics, Theory*, (Cambridge University Press, 2004).

⁶⁰⁶ For a more general discussion of this see, for example, M. Pollack, *Creeping Competence: The Expanding Agenda of the European Community*, 14(2) *Journal of Public Policy* 95 (1994).

⁶⁰⁷ See J.N. Gray, 'On the contestability of social and political concepts', (1977) 5 *Political Theory* 331-349 and C.Swanton, 'On the Essential Contestedness of Political concepts', (1985) 95 (4) *Ethics* 811-827..

⁶⁰⁸ C.Ritzer, M.Ruttloff and K.Linhart, 'How to Sharpen a Dull Sword – the Principle of Subsidiarity and its Control, (2006) 7(9) *German Law Journal*, 733-760 for further discussion.

suggest is a matter of political rhetoric,⁶⁰⁹ can be reconciled with a legal concern with determinacy and specificity, the latter reflecting a key theme of the rule of law namely government is limited by law.⁶¹⁰

Section 5 thus considers whether it is possible to identify more fully *ex ante* criteria for the application of subsidiarity thereby enabling the CJEU to engage more meaningfully with subsidiarity in its judicial reasoning. Such engagement would include the CJEU undertaking a balancing exercise to determine the proportionality of federal intervention and the advantages of such intervention and whether this outweighs the loss of Member State regulatory autonomy, but in a structured way.

The contribution of this chapter is to set out what could be agreed upon at European level by proposing that not only should the CJEU move beyond an abstract discussion of subsidiarity and proportionality but that it should explicitly address any shared competence issues in its reasoning as well as setting out specific guidance about what the factors or criteria has informed its reasoning where it has undertaken any balancing of any competing issues in its judgement. This would help to legitimise the CJEU's ruling to the Member States and address the problem of *ultra vires* EU action lacking legitimacy in the perspective of the Member States eyes.⁶¹¹ The key issues to consider here are firstly the general criteria for applying subsidiarity. Secondly, the question of whether the criteria involved in a balancing test by the CJEU should be sector specific. In particular it is proposed that each shared policy area requires different criteria to be taken into account by the CJEU when undertaking any review in order to take account of the different policy contexts and whether there are any competing interests relevant to a particular policy sector that require balancing. By adopting such an approach, it is submitted, this should better legitimise genuinely European standards that have a clear legal basis. A subsequent chapter 4 will then focus on one particular shared policy context – determining the residency rights of EU citizens – as a lens to explore how a subsidiarity and proportionality review could address competence

⁶⁰⁹ K.Endo, 'Subsidiarity and its Enemies: To what extent is Sovereignty Contested in the Mixed Commonwealth of Europe?', (Fiesolana: European University Institute, 2001).

⁶¹⁰ B.Tamanaha, *On the Rule of Law: History, Politics, Theory*, (Cambridge University Press, 2004).

⁶¹¹ N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.'

issues. Chapter 5 then forms a case study to illustrate this theoretical framework more fully.

First, however, the CJEU is introduced by explaining in section 2.1 how the CJEU is a truly unique supranational court and in section 2.2 a discussion of the pro-union interpretative tendency of the CJEU and the accusations in the literature of activism of the CJEU. This discussion provides a prelude to considering whether the CJEU is a law-maker and, if so, an EU law-making institution bound by subsidiarity when interpreting in areas of shared competence. In particular, it is argued that a common thread throughout the CJEU's case law is its teleological approach to interpretation of the Treaty and emphasis in its reasoning on promoting European integration and ensuring the uniformity and *effet utile* of EU law with the result that this eclipses other considerations such as subsidiarity.

2. Subsidiarity and judicial review by the CJEU of the political institutions

2.1. Introducing the CJEU: a unique supranational court

The CJEU is a truly unique court. Firstly it is a supranational court which differs from other international courts in the extent of its compulsory jurisdiction, which now covers almost all of EU law, and the lack of dissenting opinions.⁶¹² It does carry out certain constitutional tasks.⁶¹³ So, for example, it rules on the competences of the EU relative to the Member States.⁶¹⁴ However, despite this it is not a court primarily concerned with the protection of fundamental rights.⁶¹⁵ Indeed where it has been called upon to consider the fundamental rights of EU citizens, it has frequently struggled to articulate clearly its reasoning in a convincing and coherent way. This will be considered further in chapter 5.

⁶¹² For further discussion see V.Perju, 'Reason and Authority in the ECJ', (2009) 49 (2) Virginia Journal of International Law and who argues for a call for the CJEU to deliver dissenting judgements.

⁶¹³ B.Versterdorf, 'A Constitutional Court for the EU', <http://www.ecln.net/elements/conferences/book_berlin/vesterdorf.pdf> accessed 28.8.13.

⁶¹⁴ Ibid for further discussion of the cases in this context.

⁶¹⁵ For example as in the case of Case 43/75, *Defrenne v Sabena*, [1976]. For further discussion, see also E.Defeis, 'Human Rights and the ECJ: An Appraisal,' (2007) 31 Fordham International Law Journal at 1104 and who writes 'throughout its 50 year history, the ECJ has decided many cases which deal with fundamental rights such as non-discrimination, freedom of religion, association and expression'.

Secondly, although the EU political institutions are tasked with the making of primary legislation they are not necessarily entitled to the same degree of deference by the CJEU that a national political law-making institution has in the UK, for example, from their national courts.⁶¹⁶ For as Alesina and Wacziarg point out, although the existence of European political institutions makes them more than ‘a sample area of policy co-ordination or integrated co-operation, the exact nature of European institutions is, however, extremely vague’. Furthermore, they explain, ‘The Parliament is still more of a deliberative body than a legislative institution, the Council shares features of an executive and of a legislative institution, while the Commission is midway between a purely administrative body and an executive authority.’⁶¹⁷

This stands in sharp contrast to the position of a national court who is dealing with one supreme political law-making institution, for example as in the UK which has one main legislative body in the UK, the UK Parliament. Here the traditional view -the doctrine of Parliamentary sovereignty - is that the Parliament is the supreme law-maker.⁶¹⁸ This doctrine has been respected and recognised by the national UK courts as requiring judges to defer to the will of Parliament when interpreting statute law⁶¹⁹ although following the introduction of the Human Rights Act 1998 there has been debate on the extent to which an unelected

⁶¹⁶ *British Railways Board v Pickin*, [1974] AC 765 per Lord Reid.

⁶¹⁷ A. Alesina and R. Wacziarg, ‘Is Europe going too far?’, (1999) 51 Carnegie-Rochester Conference Series on Public Policy, 1-42 <
http://www.anderson.ucla.edu/faculty_pages/romain.wacziarg/downloads/europe.pdf> last accessed 5.8.15 at 4.

⁶¹⁸ A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, (8th ed., London: Macmillan, 1915) who put forward the traditional view that, ‘The principle of Parliamentary Sovereignty means neither more nor less than this, namely that Parliament thus defined [i.e., as the ‘King in Parliament’] has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament. See also Professor Adam Tompkins, Written evidence from the House of Commons European Scrutiny Committee as part of its enquiry into clause 18 of the EU bill and Parliamentary Sovereignty, <
<http://www.publications.parliament.uk/pa/cm201011/cmselect/cmeuleg/633ii/633we02.htm>
 >accessed 4.8.15 for a discussion of more recent commentators who have assessed the extent to which our membership of the EU has challenged this traditional view.

⁶¹⁹ *British Railways Board v Pickin*, [1974] AC 765 per Lord Reid. However there have been some judicial statements which suggest that Parliament’s powers might be struck down where fundamental constitutional rights are concerned by Lord Hope in *Jackson V Attorney General*, [2006] 1 AC 262 para 107 when he stated ‘it is of the essence of supremacy of the law that the courts shall disregard as unauthorised and void the acts of any organ of government, whether legislative or administrative, which exceed the limits of the power that organ derives from the law. In its modern form, now reinforced by the European Convention on Human Rights and the enactment by Parliament of the Human Rights Act 1998, this principle protects the individual from arbitrary government. The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based.’

judiciary should have the power to overturn the democratic will of the legislature in order to protect fundamental rights.⁶²⁰

Thirdly, the CJEU is unique in that it differs from national courts on the grounds that it is composed of judges from 28 different Member States.⁶²¹ They are assisted in their decision making task by 8 Advocate Generals.⁶²² Thus the CJEU is composed of a very diverse set of judges and this may pose difficulties when deciding cases⁶²³ where judges come from different countries, with different legal traditions. For, ‘they have had different types of education, they have different historical heritages and they think in the manner of different legal systems. They bring to the CJEU’s process of decision making a variety in legal thinking as well as their personal concepts of values’⁶²⁴. However, as Craig and de Búrca, point out, ‘there is no sophisticated literature directly examining the attitudes and preferences of judges that have served on the Court. A major reason for this void is the fact that the CJEU does not publish its votes, and does not allow for dissenting opinions; judges are also precluded from commenting publicly on their work at the Court.’⁶²⁵ For example, in the context of gender equality, Jo Shaw⁶²⁶

⁶²⁰ See B.Foley, ‘Diceyan ghosts: Deference, rights, policy and spatial distinctions’, (2006) 28 DULJ 77 at 9 and who points out how ‘British courts have paid serious attention to the concept of deference under the Human Rights Act 1998’ and at 13 how ‘both academics and the courts routinely disagree over the extent to which deference is legitimate’. For wider theoretical discussion of the allocation of power between the judiciary and the legislature and the extent to which an unelected judiciary should be able to overturn legislation that is in breach of constitutionally protected rights see for example A.Young, ‘Deference, Dialogue and the Search for Legitimacy’, (2010) 30(4) 815-831’. See also at 176 her discussion regarding the part that judicial deference plays in testing for proportionality in the UK and the difficulties of determining exactly what that part is with reference to Laws LJ in *Huang v Secretary of State for the Home Department*, [2005] UWCA Civ 105, para 49. and who commented, ‘the nature and quality of the court’s task in deciding whether an executive decision is proportionate to the aim it seeks to serve is more conceptually elusive than has perhaps been generally recognised’.

⁶²¹ Pursuant to Article 253 TFEU (ex art 223 TEC), CJEU judges are to ‘be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial office in their respective countries or who are jurisconsults of recognized competence they shall be appointed by common accord of the governments of the Member States and for a term of 6 years’.

⁶²² Pursuant to Article 251 TFEU (ex art 222 TEC) the task of the Advocate General is to issue a preliminary opinion before the final judgement of the CJEU is delivered. Such an opinion is merely advisory though and the CJEU is not therefore obliged to follow the opinion of the Advocate General. Nor is the CJEU itself bound by its own previous decisions although it frequently tends to follow its own previous decisions. See A. Arnold, *The EU and its Court of Justice*, (OUP, 1999) 53 for further discussion.

⁶²³ N.Everling, ‘The CJEU as a Decision Making Authority’. (1992) 82 *Michigan Law Review*, 1294. at 1294.

⁶²⁴ Ibid., at 1295.

⁶²⁵ P.Craig and G. De Búrca, *The Evolution of EU Law*, (2nd ed. OUP, 2011) at 146.

has questioned whether when interpreting gender equality law the predominantly male composition of the CJEU is open to question as an issue of lack of diversity.⁶²⁷ This is similar to concerns raised by J.A.G. Griffiths in respect of the UK judiciary in his book *The Politics of the Judiciary* and his argument that traditionally UK judges tend to be frequently white, male and educated at public school and Oxbridge.⁶²⁸ It is also similar to concerns raised by R.A.Posner in his book *How judges think*⁶²⁹ and the insightful discussion in that book on how the Supreme court judges make decision not on theory but on who they are, their gender, education, class and experience, the latter author being associated with a school of thought which advocates a realist approach⁶³⁰ to the theory of how judicial adjudication and adopting a sceptical view towards formalist ideas of the autonomy of legal reasoning.⁶³¹ Realism doubts the possibility of objective standards.⁶³² But in reality, although standards can be manipulated to an extent, at the same time objective standards are attainable. This will be discussed further in sections 3, 4 and 5 of this chapter and chapter 3 of this thesis in the context of operationalizing how the CJEU could undertake a subsidiarity and proportionality review in order to demonstrate its adherence to the rule of law,⁶³³ the latter being enshrined in Article 2 TEU and argued by Weiler to be a constitutional principle

⁶²⁶ J.Shaw, 'Gender and the Court of Justice' in G.De Búrca, and J.H.H.Weiler, *The European Court of Justice*, (OUP, 1999). For a more general discussion on the composition of the CJEU and women judges see S.Kennedy, 'Breaking the silence: gender mainstreaming and the composition of the European Court of Justice' (2002) 10 Feminist Legal Studies 257-270.

⁶²⁷ For further discussion see S.Kennedy, 'Breaking the Silence: Gender Mainstreaming and the Composition of the European Court of Justice', (2002) 10 Feminist Legal Studies 257-270 at 257.

⁶²⁸ (London Fontana, 1997).

⁶²⁹ (Harvard University Press, 1994). See also J. Frank, *Law and the Modern Mind*, (Peter Smith Publishing Inc., 1985), 115.

⁶³⁰ See Cornell University Law School legal institute <http://www.law.cornell.edu/wex/legal_realism> accessed 15.1.15 and who define legal realism as 'A theory that all law derives from prevailing social interests and public policy. According to this theory, judges consider not only abstract rules, but also social interests and public policy when deciding a case' and a key proponent of realism O.Wendell Holmes, *The Common law* <http://www.gutenberg.org/files/2449/2449-h/2449-h.htm> > accessed 15.1.15 at 1 and who writes 'The life of the law has not been logic; it has been experience.' See also 'Round and Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship', (1982) 95 (1) Harvard Law Review for further discussion of this approach.

⁶³¹ For further discussion see B.Leiter, 'Legal formalism and legal realism: what is the issue?' <<http://www.law.uchicago.edu/files/file/SSRN-id1646110.pdf>> accessed 6.6.15 17-31.

⁶³² See further O.W. Holmes, "The Path of the Law," in Holmes, *Collected Legal Papers* (New York: Peter Smith, 1952).

⁶³³ For further discussion see B.Tamanaha, *On the Rule of Law: History, Politics, Theory*, (Cambridge University Press, 2004).

of EU law.⁶³⁴ This is despite the fact that, ‘the Court of Justice, as the ultimate guardian of the Union legal order, is free to give an autonomous meaning to the EU principle of the rule of law even though the Court generally seeks to identify a common denominator in the constitutional traditions of the Member States when making use of a concept which was first developed at the national level’.⁶³⁵

Fourthly, the CJEU as a supranational court is also unique in that its judges enter into a dialogue with judges from the national courts. For cases before the CJEU take the form of questions which have been referred to the CJEU by the national court pursuant to the Article 265 TFEU (ex art 234 TEC) preliminary reference procedure. Such a procedure has ‘been the mechanism through which national courts and the CJEU have engaged in a discourse on the appropriate reach of Community law when it has come into conflict with national legal norms’.⁶³⁶ For such a discourse between the CJEU and the national court to take place it relies on the national court to submit those questions in the first place. Thus Cichowski writes that for example in the gender equality context that ‘trade unions and individual activists utilized available legal resources and EU rules to bring legal claims before their national courts. Operating to uphold EU interests and bring greater clarity to EU law, the CJEU resolved these disputes, and in doing so expanded the meaning and scope of EU social provisions’.⁶³⁷ This has a particular relevance as the primary audience of the CJEU is the national court to whose

⁶³⁴ J.Weiler, *The Rule of Law as a Constitutional Principle of the European Union*, Jean Monnet Working Paper No 4 (New York, 2009) at 7. See also *ibid* at 3 where he also refers to how the CJEU itself has referred to the EC as a ‘community based on the rule of law’ in Case 294/93, *Les Verts v Parliament* [1986] ECR 1339, para 23. See further *ibid* at 4 how ‘Indeed the rule of law, which is regularly equated with the idea of a “government of laws, not men”, is generally assumed...to be a “good thing”. This undoubtedly explains why the court of Justice, in stressing the importance of the rule of law as a defining element of the EC’s constitutional character, did not encounter much criticism’.

⁶³⁵ *Ibid.*, at 47. See also the discussion by Weiler at 15 who points out that AG Mancini in Case 294/93, *Les Verts v Parliament* [1986] ECR 1339 ‘seems to equate it with the notion of judicial protection or control.’

⁶³⁶ P. Craig, G. de Búrca, *EU law: Texts, Cases and Materials*, (3rd ed., OUP, 2000) 433. See also K.Allen, *Establishing the Supremacy of European Law* (OUP, 2000) for a discussion as to why the Member States have accepted the supremacy of EC law.

⁶³⁷ R.Cichowski, *The European Court and Civil Society – Litigation, Mobilisation and governance*, (Cambridge University Press, 2007) 118. See also A.Stone Sweet, ‘The ECJ and the judicialisation of EU governance’, (2010) Faculty Scholarship Series Paper 70 <http://digitalcommons.law.yale.edu/fss_papers/70/> accessed 10.7. 13 and A.Vauchez, ‘Integration-through-Law’ Contribution to a Socio-history of EU Political commonsense’, EU 1 Working Paper RSCAS 2008/10.

sense of ‘persuasive legal argument and analysis the court must appeal, by reference to the intention of the original framers of the Treaty.’⁶³⁸

The CJEU does not claim to recover original intention in its reasoning, though occasionally it does as in the case of *Kaur*.⁶³⁹ Here the CJEU considered that the 1972 Declaration by the UK of the categories of citizens to be regarded as nationals for the purpose of Community law should be taken into account when considering the scope of the Treaty.⁶⁴⁰ Consequently, the CJEU concluded that when a person of the UK is a national for the purposes of Community law, it is necessary to refer to the 1982 Declaration which replaced the previous 1972 Declaration.⁶⁴¹ This stands in sharp contrast to for example the case of *CILFIT*⁶⁴² where the CJEU did not refer to any original intention of the Treaty framers but rather held that ‘every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied’.⁶⁴³

Fifthly, the CJEU is, of course, unique from other courts in that it is reliant on the national courts of the Member States for a good part of its work.⁶⁴⁴ Furthermore, it is also up to the national court at the end of the day to apply the court’s ruling to the facts in any given case before a national court.⁶⁴⁵ Thus, when analysing cases of the CJEU account needs to be given to the relationship between the CJEU and the Member States. This is particularly important in policy areas where the EU

⁶³⁸ J.W.R.Reed, ‘Political Review of the CJEU and its jurisprudence’ <<http://centers.law.nyu.edu/jeanmonnet/archive/papers/95/9513ind.html>> last accessed 21.7.12.

⁶³⁹ Case C-192/99, *The Queen v Secretary of State for the Home Department, ex parte Manjit Kaur*, [2001] ECR I-1237.

⁶⁴⁰ Para 24.

⁶⁴¹ Para 27.

⁶⁴² Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, [1982] ECR 3415.

⁶⁴³ *Ibid.*, para 20. See also G. Conway, *The Limits of Legal Reasoning and the European Court of Justice*, (CUP, 2012) chapter 7 and in particular at 274 where he points out that the ‘ECJ itself quite rarely elaborates explicitly on the question of the choice of interpretative technique. When it does do, it tends to briefly state the need to adopt a purposive interpretation in the light of the place of particular provisions in the overall scheme of the Treaties.....identify[ing] the highest level of generality, ever-increasing integration, ignores the contestability of the extent of legal integration. This approach conceives of legitimacy on the basis of a simple linear narrative of integration. However, normativity in EU law needs to be understood more fully and comprehensively if the way in which the EU self-articulates is to be taken seriously. The extent to which integration should proceed is fundamentally a matter for the constituent power in the EU, which is the Member States. This understanding of the authority of the Member States is inherent in the principle of conferral’.

⁶⁴⁴ Not for example for reviews of legality or enforcement actions.

⁶⁴⁵ Article 267 TFEU and C.Lentz, ‘The role and mechanism of the Preliminary reference procedure’, (1994) 18 *Fordham International Law Journal*, 389.

and the Member States share competence as ultimately it is up to the national court of the Member State to decide the case in light of the CJEU's ruling. Furthermore, some shared policy areas involve highly sensitive policy areas which have traditionally been the preserve of the Member States. So, for example, in the pregnancy and maternity context such cases raise considerations of who should bear the cost of any protective measures and complex questions as to how to deal with the responsibilities that arise in the home and private sphere for a worker once they have a dependent child. Consequently, and as Reed has pointed out, 'whenever the CJEU makes a controversial decision, it does so under the shadow of [Article 270 TFEU (ex art 236 TEC)]'.⁶⁴⁶ This latter provision which provides that 'The Government of any Member State or the Commission may submit to the Council proposals for the amendment of this Treaty,' has been utilised in relation to the competences of the CJEU. So for example, Lisa Conant⁶⁴⁷ outlines two specifically direct threats that have been made in the past to CJEU competencies. Firstly, she outlines that there was an informal proposal made by the UK that CJEU rulings could be overturned by a qualified majority vote in the Council. Secondly, she also outlines that there was a proposal to eliminate the right of lower national courts to make a reference for preliminary rulings.⁶⁴⁸

Finally, and perhaps one of the most unique characteristic of the CJEU is the absence of dissenting judgments. In view of the judges of the CJEU coming from such a variety of different backgrounds, it is perhaps surprising that in a ruling of the CJEU in any particular case that it contains only the one judgment⁶⁴⁹. Despite the apparent diversity of the background for the judgements, there is no diversity of opinion reflected in the judgment. This, of course, has the advantage of speed. Indeed as Judge Edward has pointed out, 'If you've got to have the written judgment written by the majority and then the dissents written, then you're going to add months given the translation problems, to the production of the eventual

⁶⁴⁶ Ibid.

⁶⁴⁷ L.Conant, *Justice Contained: Law and Politics in the EU*, (Ithaca, NY, Cornell University Press, 2002) 236.

⁶⁴⁸ See the Debates of European Parliament OJ and EC Annex no 3 434 14 Sept 1993 at 50. Furthermore, since the majority of references to CJEU originate in lower courts, see L.Conant, *Justice Contained: Law and Politics in the EU*, (Ithaca, NY, Cornell University Press, 2002) and who points out at 236 that this would have cut of the CJEU's docket and delay proceedings considerably.

⁶⁴⁹ It has been frequently noted now the CJEU's judgements tend to be brief and declaratory. See for example P.Craig and G de Búrca, *EU law: Texts and Materials* (OUP, 2000) at 100; N. Everling, 'The CJEU as a Decision Making Authority'. (1992) 82 *Michigan Law Review*, 1294.

judgment’.⁶⁵⁰ The absence of dissenting judgments⁶⁵¹ stands in stark contrast to the European Court of Human Rights which does have dissenting judgments and manages translation problems. Indeed, recent research into the value of concurring and dissenting opinions by Professor R. White and Boussiakou reveal that interviews with the judges themselves revealed how they were

‘overwhelmingly in favour of the use of concurring and dissenting opinions because it demonstrated the nuances of human rights protection, promoted debate among the Strasbourg judiciary, indicated that questions of interpretation and application were not always clear-cut, could provide consolation for the losing party who would know that some judges appreciated their position and arguments, and demonstrated openness and transparency’.⁶⁵²

The absence of dissenting judgements in the CJEU therefore means that it is difficult for others to examine the disagreements between the judges of the CJEU. It is also impossible to examine dissenting judgments alongside the majority judgment and weigh up the extent to which each ruling has been reached in an impartial and objective way and, if not, undertake a consideration of the possible sources of any possible bias and which might have arisen on account of a particular judge’s particular affiliations or background⁶⁵³. This is of particular relevance for example in the gender equality context where despite the introduction of anti-discrimination legislation in EU law Fredman writes that ‘women remain substantially disadvantaged, in the work-place, in political life and in the home’.⁶⁵⁴ Furthermore she argues, ‘law is made by people in power, traditionally monarchs, now politicians, bureaucrats and judges, and is therefore strongly influenced by prevailing economic and political conditions and ideologies....’⁶⁵⁵ Judge Edward, on the other hand, draws attention to the fact that

⁶⁵⁰ Judge David Edward Oral History: Years on the Courts – Part 1 at 16 < <http://law.du.edu/documents/judge-david-edward-oral-history/transcript-2006-05-17-session-4.pdf> > last accessed 12.7.12.

⁶⁵¹ See V. Perju ‘Reason and Authority in the European Court of Justice’ (2009) 49(2) Virginia Journal of International Law and who calls for dissenting opinions in the CJEU.

⁶⁵² R.White and I.Boussiakou, ‘Separate Opinions in the European Court of Human Rights’, (2009) 9(1) Human Rights Law Review 37-60 at 57.

⁶⁵³ See Laffranque ‘Dissenting Opinion in the CJEU – Estonia’s possible contribution to the democratization of the EU’, <http://www.juridicainternational.eu/public/pdf/ji_2004_1_14.pdf > accessed 5.5.09.

⁶⁵⁴ S.Fredman., *Women and the Law*, (Oxford Clarendon Press, 1997) 1.

⁶⁵⁵ Ibid.

the rulings of the CJEU do not contain dissenting judgments as an advantage. This is because, he argues, judges cannot be identified with particular ideological positions. He writes thus,

‘My final reason for being against dissenting opinions is ideology. The one saving grace of the Luxembourg court is that the judges are not identified with being in the field of employment, in favour of gender equality or against gender equality; they’re not in favour of free movement of goods as opposed to the environment. They don’t become identified with particular ideological positions.’⁶⁵⁶ And I think that’s enormously valuable for the working of that particular court and I am only speaking about that particular court.’⁶⁵⁷

His comment is interesting because he does not say that ideologies are not at work, just that judges do not become identified with them. If such ideologies are at work, however, then surely such ideologies should be more openly recognised and identified by both judges and academics alike so that it can be justified. In the context of subsidiarity, this means clearly identifying the extent to which it is capable of legal adjudication.

2.2 The CJEU: Its pro-union interpretative tendency and accusations in the literature of activism

‘The EU is and has always been plagued by uncertainty. It has never been able to escape its historical failure to identify its purpose with any reasonable degree of precision. In particular, a coherent institutional account of its ‘ideal constitution’ and those values which might plausibly unite its constituents has been missing’⁶⁵⁸ However, despite such a historical failure to identify its purpose with any reasonable degree of precision, the founding fathers of the European Community did set up a judicial court with the sole responsibility for interpretation of the

⁶⁵⁶ See M. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy*, (Oxford Studies in European Law, OUP, 2004). for an assessment made of the style of judicial discourse of the CJEU as a whole.

⁶⁵⁷ Ibid.

⁶⁵⁸ A. Williams, ‘Taking Values Seriously: Towards a Philosophy of EU Law’, (2009), Oxford Journal of Legal Studies pp 1-29 at 3.

Treaties.⁶⁵⁹ They also ensured that such a responsibility was made possible in practice by the inclusion in the Treaty of Rome of an article which is now located in Article 267 TFEU. This latter article made provision for a preliminary reference procedure whereby the national courts were able refer questions of Community law arising to the CJEU. Article 19 TEU provides that the task of the CJEU is ‘to ensure that in the interpretation and application of the Treaties the law is observed’. It has therefore been given the specific task of interpretation of EU Treaties and law. Its purpose is therefore to ensure that EU legislation is interpreted and applied in the same way in all EU countries so that EU law is applied equally within the courts of the Member States. Thus, preliminary reference is not an appeal, but allows the CJEU to address purely legal questions in a consultative way: Member States’ courts are obliged to refer save where EU law is already very clear, under the *CILFIT* acte claire doctrine.⁶⁶⁰ Through the questions referred to it by the national courts this has given the CJEU the opportunity to interpret EU legislation in a variety of policy contexts⁶⁶¹. Thus the CJEU is similar to any other national court to the extent that it seeks to interpret the meaning of the provision before it. But it is also a court of ultimate authority in respect of supranational EU law i.e., it has jurisdiction to determine points of Union law and questions relating to European integration even when they arise in proceedings brought before national courts.⁶⁶² *Köbler* has reinforced this through extending State liability to judicial acts of national supreme courts.⁶⁶³

The questions from the national court that the CJEU answers Everling points out are ‘[presented] in a commonplace form, concealed in questions of interpretation that are technically complicated and directed toward specific factual situations. However, behind such narrow questions always lies the fundamental question of the general orientation and the system of values which are to apply in the Community.’⁶⁶⁴

⁶⁵⁹ Article 177 TEC.

⁶⁶⁰ Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, [1982] ECR 3415.

⁶⁶¹ Article 180 TFEU (ex art 164 TEC)

⁶⁶² See Pollicino, O., ‘Legal Reasoning of the Court of Justice in the Context of the Principle of Equality Between Judicial Activism and Self-restraint’ at 285 for further discussion.

⁶⁶³ Case C-224/01, *Köbler v Republik Österreich* [2003] ECR I-10239.

⁶⁶⁴ N.Everling, ‘The ECJ as a Decision Making Authority’ (1992) 82 *Michigan Law Review*, 1294.

The CJEU has employed a variety of methods of interpretation.⁶⁶⁵ These methods include firstly the literal interpretation, where the CJEU has described the normal meaning of the words used.⁶⁶⁶ The second method of interpretation involves a historical interpretative approach where the court has examined a variety of preparatory documents for particular pieces of secondary legislation.⁶⁶⁷ The third method of interpretation involves where the CJEU has interpreted the Treaty in favour of a broad purposive way that understands purpose at a high systemic level of generality.⁶⁶⁸ Interestingly as Beck points out, the CJEU ‘rarely mentions that it has followed a particular so-called method of interpretation such as the literal, historical or teleological (purposive) method’.⁶⁶⁹ However, the CJEU’s approach to interpretation involving the CJEU justifying its decisions ‘in terms of the cumulative weight of purposive, systemic and literal arguments’ Beck argues is an approach which ‘is more in line with orthodox legal reasoning in other legal systems than is commonly acknowledged’.⁶⁷⁰

On the other hand, from an early stage in its history, the CJEU has displayed a pro-union interpretative tendency particularly when it has acted at a supranational level as both a constitutional court⁶⁷¹ and a court protecting the rights of

⁶⁶⁵ Even though as G.Beck, *The Legal Reasoning of the Court of Justice of the EU*, (Hart Publishing 2012) at 282, relying on evidence from a study by Dederichs, *Die Methodik des EuGH* (Baden-Baden, Nommos, 2003) 64 et seq as well as his own examination of the Court’s case law for 2011 where the Court relied on purposive arguments in nearly 74% of all cases, points out ‘the CJEU rarely expressly mentions that it has followed a particular so-called method of interpretation, such as the literal, historical or teleological (purposive) method, although it readily refers to the wording, context, general scheme or indeed the precise words and provision in question, and the purposes, objectives and spirit of the EU Treaties and legislation adopted under it.’

⁶⁶⁶ See for example C-233/96 *Denmark and Commission* [1998] ECR I-5759 at para 38.

⁶⁶⁷ See for example Case 29/69, *Stauder v City of Ulm*, [1969] ECR 419 at 5. It cannot however rely on the travaux préparatoires for the Treaties which are not available to it.

⁶⁶⁸ Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, [1982] ECR 3415.

⁶⁶⁹ G.Beck, *The Legal Reasoning of the Court of Justice of the EU*, (Hart Publishing 2012) at 281.

⁶⁷⁰ G.Beck, *The Legal Reasoning of the Court of Justice of the EU*, (Hart Publishing 2012) chapter 9 for further discussion of the CJEU’s cumulative approach to interpretation and who notes that ‘the Court of Justice’s rare declarations as to its general method are not always consistent and therefore not terribly helpful in determining the topoi of interpretation. Indeed, the Court may support its reasoning and decisions with statements endorsing the most diverse interpretative approaches’. See also Beck chapter 5 for a more general discussion of differing theoretical views of legal reasoning and in particular at 126 the summary of Alexy’s ‘canons of interpretation as representative of the interpretative aids typically employed across legal systems’ in R.Alexy, *Theorie der juristischen Argumentation* (Frankfurt am Main, Suhrkamp, 1983).

⁶⁷¹ AM. Donner, ‘The Constitutional Powers of the Court of Justice of the European Communities’, 11 *CMLRev* 127-140 (1974).

individuals within the Member States when interpreting the Treaties⁶⁷² So, for example, in the case of *Costa*, it has acted in the capacity of a constitutional court when it enunciated the supremacy of EU law even in the absence of explicit textual support when it ruled that: ‘By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.’⁶⁷³

The CJEU has also provided protection for individuals within the Member States of rights arising from the Treaties thus enabling EU citizens to rely on EU law in national courts. This was first enunciated in the case of *Van Gend en Loos* where the CJEU ruled that ‘The Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights....and the subjects of which comprise not only Member States but also their nationals’.⁶⁷⁴

In these early cases the CJEU has realised a central role in furthering of integration even where there was no explicit textual support through the use of purposive interpretation that understands purpose at a high systemic level of generality which tends to favour integration.⁶⁷⁵ Such rulings clearly illustrate a clear pro-union interpretative tendency of the CJEU.

A particular feature of the law-making role of the CJEU demonstrating its pro-Union interpretative tendency is its emphasis in its reasoning on the uniformity

⁶⁷² U.Everling, ‘The CJEU as a Decision making Authority’, (1994) 82 Michigan Law Review 1294. See also H. Rasmussen, *On Law and Policy of the European Court of Justice* (Martinus Nijhoff 1986), and T. Hartley, ‘The European Court, Judicial Objectivity and the Constitution of the European Union’, 112 *Law Quarterly Review* 95-109 (1996).

⁶⁷³ Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585

⁶⁷⁴ Case 26/62 *NV Algemene transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

⁶⁷⁵ Lasser, M., *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (OUP, 2004) 231; G.Conway, G., *The Limits of Legal Reasoning and the European Court of Justice*, (CUP, 2012) 22.

and effet utile of EU law.⁶⁷⁶ Thus, in respect of effet utile, this has involved the CJEU emphasising the importance of ensuring the effectiveness of EU law in its reasoning when adjudicating. So, for example, as Snyder points out,

‘In dealing with the problem of non-transposition of directives, the basic tool of the Court of Justice has been the gradual, piecemeal development of a judicial liability system. As a means of supervision and control, the creation of a judicial liability system is not unusual. However, the system which has been developed by the Court of Justice has distinctive features. First, it has been established by the process of adjudication, that is, gradually by the judiciary, rather than in a single act by the legislature. Secondly, it has been directed mainly at governments, not at private organisations. Thirdly, its primary target has been the failure of Member States to fulfil their Treaty obligations, in particular by failing to transpose Community directives into national law. Fourth, and consequently, its aim has been limited in scope: to enforce the correct transposition of directives, that is, to ensure the effectiveness of Community law in this limited (but none the less important) formal sense. Fifth, the branch of Community-level government from which complainants seek relief, in the last instance, is the same branch which is the source of the rules, that is, the Court of Justice. Sixth, the system depends on one of the key relationships in the Community, namely the relationship between the Court of Justice and national courts’.⁶⁷⁷

However, the CJEU’s devotion to emphasising effet utile in its reasoning has meant that the CJEU has failed to consider subsidiarity and localism especially when reviewing EU institutional action. This is evidenced, for example, in the *Working Time Directive case*⁶⁷⁸, a case where the UK challenged the validity of a Directive concerning certain aspects of the organisation of working time, where the CJEU failed to check whether the EU institutions had demonstrated that the

⁶⁷⁶ For further discussion of this see F.Snyder, ‘The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques’, (1993) 56(1) *Modern Law Review* 19-54; G. Conway, *The Limits of Legal Reasoning and the European Court of Justice*, (CUP, 2012) at 116-7 and who questions at 117 whether ‘an appeal to effectiveness is sufficient on its own to justify judicial innovations’.

⁶⁷⁷ F.Snyder, ‘The Effectiveness of EC Law: Institutions, Processes, Tools and Techniques’, (1993) 56 *Modern Law Review*, 19-56 at 52.

⁶⁷⁸ Case C-84/94, *UK v Council* [1996] ECR I-5755.

EU could achieve value-added protection when bringing in legislative measures for Community harmonization in this context. This case will be considered further in the next section.

Uniformity of EU law in a Union of 28 Member States who all have very different legal systems is also a particularly important issue for a supranational body such as the EU. This is especially the case regarding Directives, the latter being the responsibility of each Member State to give effect to by their own national legislation. Where Member States have not implemented Directives, the CJEU has applied direct effect. Direct effect was first created of Treaty provisions,⁶⁷⁹ extended to secondary legislation in *Franz Grad*⁶⁸⁰ whereby an individual is able to rely on an unimplemented directive in a national court, provided certain conditions are met.⁶⁸¹ One of famous early cases where the CJEU applied direct effect of directives arose in the *Defrenne II* case concerning Article 119 TEC.⁶⁸² As Pollicino points out this case was illustrative of the CJEU law-making through its creative interpretation of Article 119 TEC.⁶⁸³ A common thread running through such creative interpretation is the emphasis in the CJEU's reasoning on the importance of having uniformity in respect of common standards and ensuring the *effet utile*. This is a particularly important consideration for a supranational law especially in terms of ensuring the uniform interpretation of common standards at supranational level.⁶⁸⁴ The CJEU has played an important part in developing these common standards when interpreting EU gender equality rules, for example as well as emphasising in its case law that Member States should not apply rules which are 'liable to jeopardize the achievement of the objectives pursued by a Directive'.⁶⁸⁵ Thus *effet utile* has been utilised by the CJEU to resolve the problems in particular of where an unimplemented Directive was not

⁶⁷⁹ Case 26/62 *NV Algemene transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

⁶⁸⁰ Case 9/70, *Franz Grad v Finanzamt Traunstein*, [1970] ECR 825.

⁶⁸¹ See P. Craig, and G.de Búrca, *EU Law: Text, Cases and Materials*. (4th ed.Oxford: Oxford University Press, 2007) at 272-277 for a discussion of the conditions for direct effect of Treaty provisions, Regulations and Directives.

⁶⁸² Case 43/75 *Defrenne v Sabena (Defrenne II)*, [1976] ECR 455

⁶⁸³ O.Pollicino, 'Legal Reasoning of the Court of Justice in the context of the Principle of Equality Between Judicial Activism and Self-restraint', (2006) 5 (3) German Law Journal, <http://www.germanlawjournal.com/pdfs/Vol05No03/PDF_Vol_05_No_03_283-317_European_Pollicino.pdf> last accessed 12.5.13. at 292.

⁶⁸⁴ In the the *Defrenne II* case this concerned EU gender equality.

⁶⁸⁵ Case C-393/10, *O'Brien v Ministry of Justice* at para 35.

capable of direct effect as illustrated in *Von Colson*.⁶⁸⁶ Here the CJEU ruled that where an unimplemented Directive was not capable of direct effect that the CJEU should interpret any relevant national legislation as far as possible to conform with the provisions of the Directive.⁶⁸⁷

Furthermore, in subsequent case law, the CJEU have emphasized the importance of effet utile of such EU law rights at national level through effective judicial protection at national level of EU equal treatment rights. So, for example in the case of *Johnston*⁶⁸⁸, the CJEU emphasized the importance of a right to an effective judicial remedy for breach of EU equal treatment rights. As the CJEU stated, ‘all persons have the right to obtain an effective remedy in a competent court against measures which they consider to be contrary to the principle of equal Treatment for men and women laid down in the Directive’.⁶⁸⁹ Furthermore, the CJEU explained that it is for the Member State to ensure effective judicial control of the ‘national legislation intended to give effect to the rights for which the Directive provides’.⁶⁹⁰

Relatedly, the CJEU also established in the case of *Von Colson*⁶⁹¹ that to promote the effet utile of EU law rights that the national court should impose an effective sanction for breach of EU law. This case concerned a referral to the CJEU regarding a Ms Colson who argued that she had been discriminated against on the grounds of sex when she was applied for a job as a prison worker but was refused on the grounds of her sex. The CJEU reasoned that national courts ‘are required to interpret their national law in the light of the wording and the purpose of the Directive in order to achieve the result referred to ...’⁶⁹² The CJEU then ruled that ‘it is impossible to establish real equality of opportunity without an appropriate system of sanctions’.⁶⁹³ In light of the importance of sanctions having a deterrent effect in this context it then considered the question of the adequacy of national remedies in this particular case in light of the requirement in the Equal

⁶⁸⁶ Case 14/83, *Von Colson and Kamann v Land Nordrhein-Westfalen*, [1984] ECR 1891.

⁶⁸⁷ For further discussion more generally of the scope and limits of direct effect of Directives see Craig, P., and de Búrca, G., *EU Law: Text, Cases and Materials*. (5th ed., Oxford: Oxford University Press, 2011) at 194-216.

⁶⁸⁸ Case 222/84, *Johnston v Chief Constable of the RUC*, [1986] ECR 1651.

⁶⁸⁹ *Ibid.*, at para 19.

⁶⁹⁰ *Ibid.*

⁶⁹¹ Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891.

⁶⁹² *Ibid.*, at para 28.

⁶⁹³ *Ibid.*

Treatment Directive for national remedies to be both adequate and effective. In the words of the CJEU, ‘if a Member State chooses to penalise breaches of that prohibition by the award of compensation, then in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation such as, for example, the reimbursement only of the expenses incurred in connection with the application’.⁶⁹⁴ Such a ruling clearly emphasised the importance of the need for national courts to ensure the effectiveness of EU law rights by providing an adequate remedy.⁶⁹⁵

In the case of *Marshall II*,⁶⁹⁶ Mrs Marshall then sought compensation for the loss she had sustained from the existence in the UK of retirement legislation that had required her to retire at 60 whereas male colleagues were able to retire at 65.⁶⁹⁷ However, there was a statutory limit on the amount of compensation that she could receive under UK legislation. Following an appeal to the House of Lords challenging the level at which damages could be set under UK legislation, a reference was sent to the CJEU requesting whether Article 6 of the Equal Treatment Directive could be relied on to challenge national legislation limiting the amount of compensation that could be awarded. The CJEU ruled that any UK rules limiting the amount of damages that could be obtained had to be disapplied. The reasoning for this, the CJEU explained, was to ensure that for breach of EU rules on equal treatment an effective remedy was available. Both the rulings in *Marshall I* and *Marshall II* were significant in emphasising to the national court the need to ensure the uniformity and effectiveness of EU gender equality law demonstrating a pro-union interpretative tendency of the CJEU.

Firstly, the ruling in *Marshall I* that gender equality Directives could in principle be capable of direct effect in horizontal situations⁶⁹⁸ enabled individuals in

⁶⁹⁴ Ibid., at para 2.

⁶⁹⁵ The *Von Colson* principle of indirect effect has not always been able to be applied for example as in the criminal context in cases where this would involve the retroactive prosecution for breach of an EU directive as evidenced in Case 80/86, *Public Prosecutor v Kolpinghuis Nijmegen BF*.

⁶⁹⁶ Case C-271/91 *Marshall v Southampton and South-West Hampshire Area Health Authority* (No 2) [1993] ECR I-4367

⁶⁹⁷ Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] ECR 723; Case C-271/91 *Marshall v Southampton and South-West Hampshire Area Health Authority* (No 2) [1993] ECR I-4367.

⁶⁹⁸ The first attribution of the concept of direct effect to Directives was in the case of C41/74 *Van Duyn v Home Office* where the CJEU ruled that the provisions of Directive 64/221 were in

Member States to rely in principle in national courts on the provisions of EC Directives against a State or an emanation of the State.⁶⁹⁹ There are important effects of attributing direct effect to the Equal Treatment Directive in this case. For example, the attribution of direct effect to Directives, including the Directive at issue in the *Marshall* case, has enabled the doctrine to be used as a ‘sword’ in that ‘it imposed Community law upon the national courts; it forced them to treat it as a source of law to be applied in cases before them.’⁷⁰⁰ It has also been argued that through the concept of direct effect, ‘Citizens are given a role in the new legal order and the Treaty becomes more than just a Treaty’⁷⁰¹

Secondly, in *Marshall II* the CJEU ruling that a national court should ignore both national laws setting a statutory limit on damages and a power to award interest and instead provide an adequate level of damages was explicitly on the grounds of ensuring the effectiveness of EU equal treatment law at a national level.⁷⁰² Article 6 of the new Directive 2002/73 incorporates various aspects of the CJEU case law in this context.⁷⁰³

Thus the above discussion has highlighted how the CJEU has emphasised the importance of the *effet utile* of these common standards of gender equality in the employment sphere at national level. However, it is surprising that despite the fact that such standards arise in an area of shared competence and that there is

principle capable of having direct effect. This meant therefore that there could be judicial enforcement of rights arising from the provisions of that Directive and that such provisions were in principle capable of being upheld in national courts. For, and as the CJEU explained in the case of *Van Duyn*, ‘it would be incompatible with the binding effect attributed to a Directive by Article 189 to exclude, in principle, the possibility that the obligations which it imposes may be invoked by those concerned’.

⁶⁹⁹ Ibid where the CJEU held that for or a Directive to have direct effect, it must be clear, unconditional and precise, the operation of the measure must not be dependent on further action by the state or Community and that the relationship between the claimant and the defendant must be vertical. See also P.Craig., G.De Búrca, *EU Law, Texts, Cases and Materials*, (3rd ed., OUP, 2002) 185-9 for further discussion regarding the conditions that must be satisfied for a Directive to have direct effect.

⁷⁰⁰ S.Prechal, ‘Does direct effect still matter?’ 2000 CMLRev 37 1047-1069, 200 at 1047

⁷⁰¹ S. Douglas Scott, *Constitutional Law of the EU*, Harlow, Essex, Pearson Education 2002 at 310.

⁷⁰² See also Case C-180/95 *Draehmpaehl v Urania Immobilienservice* [1997] ECR I-2195 and Article 18 of the amended Equal Treatment Directive which has included some exceptions to the rule that there can be no limit on damages set by national law.

⁷⁰³ Case C-303/06 *Coleman v Attridge Law*, [2008] ECR I-5603 is a further example of where the CJEU has emphasised the importance of ensuring the effectiveness of EU law in relation to the principle of equal treatment but in the context of discrimination on the grounds of disability pursuant to the Framework Directive. For discussion of this case see M.Pilgerstorfer and S.Forshaw, ‘Transferred Discrimination in European law’, (2008) 37(4) *Industrial law Journal* 374.

considerable cultural diversity of legal gender regimes, there is no consideration of subsidiarity by the CJEU in its preliminary rulings regarding emphasising to national courts the importance of the effet utile of these common uniform standards at national level. Thus effet utile is used to smother subsidiarity with an integration logic and demonstrates the CJEU displaying a pro-union interpretative tendency.

In other policy contexts, there have also been other moves by the CJEU which have attracted considerable criticism in academic literature on the grounds that the CJEU has frequently in its interpretation in a variety of policy contexts displayed a pro-Union interpretative tendency and gone beyond the meaning of the wording of the texts of the Treaties agreed by the Member States.⁷⁰⁴ This is an important issue for the CJEU as by interpreting beyond the meaning of the Treaty text this falls short of demonstrating to the Member States that they are complying with a key tenet of the rule of law, the requirement of formal legality⁷⁰⁵,

The CJEU has displayed a pro-Union interpretative tendency especially where the common market is involved. As Everling highlights ‘the common market constitutes the starting point for the entire integration process and all attempts at more far-reaching economic and political progress stem from it. Running like a red thread through the whole of the Court’s case law is the idea that this core of the Community must remain sacrosanct’.⁷⁰⁶ So, for example, in the free movement of goods context he highlights how ‘particularly well known are the conflicts arising from the rules governing the manufacture and marketing of products that have still not been harmonised, a situation which the decision in the *Cassis de Dijon* case was designed to meet’.⁷⁰⁷ Creative interpretation on the part of the CJEU is also evident in the free movement context, for example in the cases

⁷⁰⁴ See for example P.Neill, *The European Court of Justice: A Case Study in Judicial Activism* (London: European Policy Forum, 1995); T.Hartley, ‘The European Court, Judicial Objectivity and the Constitution of the European Union’, (1996) 112 *Law Quarterly Review* 95-109 at 95.

⁷⁰⁵ J.Waldron, ‘Is the Rule of Law an Essentially Contested Concept (in Florida)?’, (2002) 21(2) *Law and Philosophy* 154-5.

⁷⁰⁶ N.Everling, ‘The ECJ as a Decision Making Authority’ (1992) 82 *Michigan Law Review*, 1294 at 1306.

⁷⁰⁷ N.Everling, ‘The ECJ as a Decision Making Authority’ (1992) 82 *Michigan Law Review*, 1294 at 1305. See also Beck 240 and ‘how this case established a long line of authority and are now

of *Dassonville*⁷⁰⁸ and *Bosman*⁷⁰⁹ where the CJEU adopted a wide interpretation covering non-discriminatory obstacles.

More radically, the CJEU has also allowed free movement (*lex generalis*) to be engaged, thereby circumventing more specific shared competences. This is discussed by Conway and who explains how, for example, in the decisions in *Laval* and *Viking* that the CJEU held that the right to strike fell within the scope of the free movement principle by bringing ‘the right to strike within Union competence, despite the right to collective action being expressly excluded from the social competence of the Community by then Article 137(5) EC Treaty (now Article 153(5) TFEU).’⁷¹⁰

Perhaps the most remarkable creativity and demonstration of a pro-Union interpretative tendency of the CJEU however is the development of the key constitutional doctrines by the CJEU discussed above.⁷¹¹ Firstly, the doctrine of supremacy of EU law over national law in the event of a conflict between the two in the case of *Costa*.⁷¹² Secondly, the creation of direct effect in the case of *Van Gend* whereby an individual was able to rely on a provision of EU law in a national court provided certain criteria are satisfied⁷¹³ despite the absence of an explicit Treaty basis for such doctrines.⁷¹⁴

regarded as settled law and effectively as firmly entrenched as the underlying treaty provisions themselves.’

⁷⁰⁸ Case 8/74, *Procureur du Roi v Dassonville*, [1974] 2 CMLR 436.

⁷⁰⁹ Case C-415/93 *Bosman* [1995] ECR I-4921.

⁷¹⁰ See Case C-341/05, *Laval un Partneri Ltd, v Svenska Byggnadsarbetarefobundet*, [2007] ECR I-11767 and Case C-438/05, *The International Transport Workers’ Federation and the Finnish Seamen’s Union v Viking Line ABP and OU Viking Line Esti* [2007] ECR I-10779 discussed by G.Conway, *The Limits of Legal Reasoning and the European Court of Justice*, (CUP, 2012) 49

⁷¹¹ See also the cases of Cases C-6/90 and 9/90 *Francovich and Bonifaci v Italy*, [1991] ECR I-5357 where the CJEU created the doctrine of state liability even though there was no explicit Treaty basis for this doctrine. Rather the CJEU at para 33 emphasised the importance of ensuring the effectiveness of Community law.

⁷¹² Case 6/64, *Costa v ENEL* 594. See also the later case of Case 11/70 *International Handelsgesellschaft* [1970] ECR 1125 para 3 where the CJEU further extended the supremacy of EU law over national law to include national constitutional law.

⁷¹³ The CJEU ruled in Case 26/62 *N V Algemene Transporten Expeditie Onderneming Van Gend en Loos v Nederlandse Administratie der Belastingen*, [1963] ECR 31 that for an individual to rely on the direct effects of Article 12 that the provision must be clear, precise, unconditional and no room for discretion on the part of the Member State.

⁷¹⁴ Case 26/62 *N V Algemene Transporten Expeditie Onderneming Van Gend en Loos v Nederlandse Administratie der Belastingen*, [1963] ECR 31. Although there was no explicit Treaty article cited, Craig and De Búrca Op. Cit. at 185 explain how there was some implicit support evident from the reasoning of the CJEU in its reference to the Preamble and also through its interpretation of the type of Community that the Treaties were creating as being a ‘new legal order of international law’.

However, where the CJEU has interpreted the Treaty in favour of a broad purposive way that understands purpose at a high systemic level of generality demonstrating a pro-union interpretative tendency, this has been subject to considerable academic debate. In particular, academic literature has emphasised the distinction between interpretation⁷¹⁵ and judicial activism. So, for example, and as Pollicino writes ‘According to this distinction, the former is considered a legitimate expression of judicial function and the latter its degeneration, involving a judge’s arbitrary intrusion into the political arena by giving priority to values other than legal ones, such as, in the case of the CJEU, supporting the process of European integration.’⁷¹⁶ Pollicino concludes by explaining that the CJEU’s law-making is achieved by the CJEU on account of the unique teleological approach that the CJEU has adopted when interpreting the Treaties.⁷¹⁷ The teleological approach was explicitly discussed by the CJEU in the case of *CILFIT* where it stated that ‘every provision of EC law must be placed in its context and interpreted in the light of Community law as a whole....’⁷¹⁸ Such an approach to interpretation has been widely regarded as radical⁷¹⁹ although as Hans Kutscher, has pointed out, ‘How else should the Court of Justice carry out this function which it has been assigned except by an interpretation of Community law geared to the aims of the Treaty, that is to say, one which is dynamic and teleological?’⁷²⁰ Furthermore, it has been argued by the CJEU itself that a purposive interpretation is needed to ensure that EU law has a useful effect when it held in *Francovich* that, ‘the full effectiveness of Community rules would be

⁷¹⁵ See further T.Spaak, ‘Guidance and Constraint: The Action-Guiding Capacity of Neil MacCormick’s Theory of Legal Reasoning’, (2007) 26(4) *Law and Philosophy* 343-376.

⁷¹⁶ O. Pollicino, ‘Legal Reasoning of the Court of Justice’, [2004] 5(3) *German Law Journal* at 285.

⁷¹⁷ See J.Bengoetxea, *The Legal Reasoning of the European Court of Justice*, (1993) for further discussion of the method of reasoning that the CJEU employs. See in particular his discussion at 114 that the method of interpretation that the CJEU adopts when deciding cases is an important question as the CJEU does not enjoy primary authority to create law because the Court must satisfy its audience that in their decisions they are applying valid law. See also A. Bredimas, *Methods of Interpretation and Community Law* (North Holland, 1978) and Koopmans, T, ‘The Theory of Interpretation and the Court of Justice’, in O’Keefe and Bavasso (eds) *Judicial Review in EU law* (Kluwer, 2000)

⁷¹⁸ Case 283/81 *CILFIT v Ministry of Health* [1982] ECR 3415.

⁷¹⁹ A.Arnall, *The European Union and its Court of Justice*, (Oxford EC Library, 1999) 516 and who explains how derogations have tended to be interpreted strictly. Arnall writes, ‘Its rationale is that a derogation should not be interpreted in such a way as to extend its effects beyond what is necessary to safeguard the interests it seeks to protect. If the derogation were to be interpreted more broadly, it might undermine the general rule, thereby jeopardizing the attainment of the overall objective of the provisions concerned’.

⁷²⁰ A.Arnall, *The European Union and its Court of Justice*, (Oxford EC Library, 1999) 516 and who refers to an extract from a paper given at a Judicial and Academic conference at the Palais de Justice, Luxembourg in 1976 at 209.

impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible'.⁷²¹ The focus here is therefore on ensuring the effectiveness of EU law even where there is no explicit Treaty provision giving a right to an individual to seek compensation from the state where it fails to implement or mis-implements a Directive, or any other provision of EU law.⁷²²

Furthermore, Pollicino argues that judicial function encourages not just interpretation but law-making.⁷²³ Such a need for law-making, he explains, is particularly so in the European context for various reasons and where the CJEU frequently employs in its reasoning a teleological approach to interpretation where it looks at the purpose of particular legal rules. Firstly, on account of the legislative inertia that has been prevalent in the history of the EU.⁷²⁴ Rasmussen has also explained how, 'The most-favoured rationale for this involvement has been that judicial activism was needed in order to break the impasse into which the political branches had settled.'⁷²⁵ Secondly the framework nature of a Treaty requires the CJEU to interpret creatively to fill in the gaps.⁷²⁶ Thirdly he argues that frequently the CJEU is creatively interpreting in order to avoid denying justice to the individual seeking to rely on a right pursuant to EU law.⁷²⁷ Fourthly, he argues that the multilingual nature of EU law 'implies that the expressions

⁷²¹ Cases C-6/90 and C-9/90 *Francovich and Others v Italian State* [1991] ECR I -5357 at para 33.

⁷²² See also Craig, P., and de Búrca, G., *EU Law: Test, Cases and Materials*. (5th ed., Oxford: Oxford University Press, 2011) at 245 who point out how the subsequent cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v Germany*, and *R V Secretary of State for Transport, ex parte Factortame Ltd and Others*, [1996] ECR I-1029 'the CJEU situated the principle of state liability in the context of the Treaty provisions on liability of EU institutions under Article 340 TFEU, which in turn are expressly based on the general principles common to the Member States. This reasoning seems intended to legitimate the development of the principle of state liability, ostensibly deriving it from well-established principles of the national legal orders rather than from the imagination of the CJEU'.

⁷²³ Craig, P., and de Búrca, G., *EU Law: Test, Cases and Materials*. (5th ed., Oxford: Oxford University Press, 2011) at 286.

⁷²⁴ *Ibid* at 288.

⁷²⁵ H. Rasmussen, 'Towards A Normative Theory of Interpretation of Community Law', (1992) *The University of Chicago Legal Forum*, 135-178, at 137.

⁷²⁶ H. Rasmussen, 'Towards A Normative Theory of Interpretation of Community Law', (1992) *The University of Chicago Legal Forum*, 135-178 at 288.

⁷²⁷ *Ibid*.

contained in the Treaties are beset by the difficulties involved in expressing their meaning in various linguistic versions’,⁷²⁸ the latter difficulty being explicitly addressed by the CJEU in *CILFIT* when it ruled that ‘it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions’.⁷²⁹ This is a particularly important consideration when interpreting particular wording in the ruling is considered in later case law where particular terminology has been interpreted differently between different languages. For example, Vauchez highlights that in the *Van Gend* case there was differing interpretation of the key terminology of direct effect in various languages.⁷³⁰ As he explains,

‘while the English-speaking version mentioned the ‘direct effects’ (ECJ 1963:13), the French one spoke about effets immediats (CJCE 1963:21), the unofficial translation made by the Common Market Law Reports referred to ‘direct effect’ with no plural to it, not to mention the rich vocabulary legal scholars mobilized to comment it (self-executing articles, direct application, direct insertion...) this ambiguity of the decision as well as the fluidity in the lexicon not only indicates that no legal commonsense had yet imposed itself erga omnes, but also confirms that a wide range of possible legal futures were still open’.⁷³¹

The frequent use by the CJEU of a teleological approach has also led a few commentators to argue that ‘teleological interpretation can also be seen as more faithful to the democratic outcomes since it prevents textual manipulation of the legal rules.’⁷³²

However this is a debatable point of view and against the weight of analysis in the literature where a more general charge is that teleological interpretation is more open to manipulation because of the issue of varying levels of generality.⁷³³ So

⁷²⁸ Ibid., at 289.

⁷²⁹ Case 283/81 *CILFIT v Ministry of Health* [1982] ECR 3415 para 18.

⁷³⁰ A. Vauchez, ‘Integration-through-Law’ Contribution to a Socio-history of EU Political commonsense’, EU 1 Working Paper RSCAS 2008/10 at 12.

⁷³¹ Ibid.

⁷³² A. Vauchez, ‘Integration-through-Law’ Contribution to a Socio-history of EU Political commonsense’, EU 1 Working Paper RSCAS 2008/10 at 10.

⁷³³ See for example M. Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (OUP, 2004) at 288.

rather than the CJEU just looking at the spirit and purpose of the Treaty rules the CJEU goes further and also considers the Treaty rule in light of the broader context of the EU legal order – a meta-teleological approach.⁷³⁴ A classic example of the latter approach is evidenced in *CILFIT*⁷³⁵ where the CJEU stated that ‘every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objective’s thereof and to its state of evolution at the date on which the provision in question is to be applied’.⁷³⁶

One of the most stringent critics of the meta-teleological approach⁷³⁷ and the expansive approach to the interpretation of free movement is by Conway who has pointed out how the CJEU rarely explains its interpretative method preferring instead a broad purposive approach and an emphasis in its reasoning on the importance of the effectiveness of EU law.⁷³⁸ Furthermore, he explains the CJEU does not follow the Vienna Convention to the extent that it does not prioritise textual interpretation over teleological interpretation. This he points out is incompatible ‘with a universalised conception of legal reasoning’.⁷³⁹

The consistent failure by the CJEU to make explicit its reasoning and interpretative assumptions he concludes makes inconsistency between cases less

⁷³⁴ M.Maduro ‘Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism’ 1 (2) European Journal of Legal Studies <<http://www.ejls.eu/2/25UK.pdf>> last accessed 3.1.15 at 5

⁷³⁵ Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, [1982] ECR 3415

⁷³⁶ *Ibid* para 20.

⁷³⁷ See., for example T.Hartley, ‘The European Judicial Objectives and the Constitution of the EU’, (1996) 112 LQR, 95 and who argues at 95 that the CJEU sometimes interprets provisions of the Treaty contrary to the natural meaning of the words used and has taken place in pursuance of a settled and consistent policy of promoting European federalism e.g. the creation of direct effect in *Van Gend*; R. Herzog and L.Gerken: ‘Stop the European Court of Justice’, EU Observer.com, (2008) <<https://euobserver.com/opinion/26714>> (last accessed 20.8.15) and who are critical of CJEU ruling that there was a general principle of Union law against age discrimination even where there was no explicit reference in the Treaty to such a principle. See also G.Conway, *The Limits of Legal Reasoning and the European Court of Justice*, (CUP, 2012) 79-83 for further analysis of the key literature on the activism of the CJEU.

⁷³⁸ G.Conway, *The Limits of Legal Reasoning and the European Court of Justice*, (CUP, 2012) at 22.

⁷³⁹ G.Conway, G., *The Limits of Legal Reasoning and the European Court of Justice*, (CUP, 2012) at 23. And also at 10 citing M.Bengoetxea, N.MacCormick, L.M.Soriano, ‘Integration and Integrity in the Legal Reasoning of the European Court of Justice’, in G.De Burca and J.H.H.Weiler (eds), *The European Court of Justice*, (Oxford University Press, 2001) that ‘Legal reasoning is regarded by many scholars as necessarily having a universal character to justify the general normative claim to obedience that it makes: in other words, there is no special case of European legal reasoning, nor anything particularly European about the way the ECJ proceeds to justify its decisions. Rather, any general theory of legal reasoning...could account for the ECJ’s decision-making. Obviously certain rearrangements would need to be made in order to adjust the general theory to the different idiosyncratic elements of the European legal system’.

obvious and ‘focuses attention on outcomes rather than processes’.⁷⁴⁰ This does mean that the CJEU is able to promote a pro-Union stance without explicitly stating as such. However, the promotion of a pro-Union stance runs the risk of claims of judicial activism and a lack of impartiality and objectivity which challenges the legitimacy of the CJEU in the eyes of the Member States.⁷⁴¹

Other critics too have argued that such an activist approach has gone beyond standard methods of judicial interpretation in order that the CJEU can promote European federalism. Hartley, for example, argues that the court has a policy of promoting European federalism often refusing to accept the natural meaning of treaty provisions.⁷⁴² Herzog and Gerken point out how the CJEU are even prepared to rule that there was a general principle of Union law against age discrimination even where there was no explicit reference in the Treaty to such a principle.⁷⁴³

Furthermore, they argue that ‘judicial decision-making in Europe is in deep trouble. The reason is to be found in the European Court of Justice (CJEU), whose justifications for depriving member states of their very own fundamental competences and interfering heavily in their legal systems are becoming increasingly astonishing. In so doing, it has squandered a great deal of the trust it used to enjoy’.⁷⁴⁴

Such claims that judicial interpretation displays a pro-union interpretative tendency going beyond standard methods of judicial interpretation are an important concern. This is because as the CJEU does not enjoy primary authority to create law, the CJEU must satisfy its audience that in these decisions they are

⁷⁴⁰ Ibid., at 26

⁷⁴¹ See also G.Beck, G., *The Legal Reasoning of the Court of Justice of the EU*, (Hart Publishing 2012) referring to the *Pringle* case and who argues at 449 that the CJEU is keen to protect the European integration process particularly ‘in critical cases and emergency situations [where] written EU law no longer imposes any effective constraints on the judiciary and that in critical cases which may fundamentally affect the integration process within the EU, the Eurozone as a whole, the law is becoming what the judges say it is whatever the new meaning of the written law and whatever the written law actually says’.

⁷⁴² T.Hartley, ‘The European Court, Judicial Objectivity and the Constitution of the European Union’, (1996) 112 *Law Quarterly Review* 95-109 at 95.

⁷⁴³ See R. Herzog and L.Gerken: ‘Stop the European Court of Justice’, *EU Observer.com*, (2008) < <https://euobserver.com/opinion/26714> > (last accessed 13.8.15).

⁷⁴⁴ R. Herzog and L.Gerken, ‘Stop the European Court of Justice’, <<http://euobserver.com/7/26714>> accessed 2.5.12. See also K. Hänsch, ‘A Reply to Roman Herzog and Lüder Gerken’, 3(2) *ECLR* 219-224 (2007)]

applying valid law that interpretation does not constitute law-making.⁷⁴⁵ Applying valid law demonstrates a respect for the rule of law.⁷⁴⁶ The rule of law is a neutral arbiter; it avoids the judiciary having to make substantive moral choices themselves and helps to counter claims that the CJEU has an unjustified emphasis on an ever closer Union. Furthermore, and as Everling explains,

‘courts create their own legitimacy by the quality of their decisions. The inherent power of persuasion of their judgements entitles courts to expect acceptance by those affected by the decisions. Reliance on the power of persuasion is particularly important in a system such as the Community in which the means for enforcing judgements are limited and in which compliance with them ultimately depends on the recognition by all concerned that the common interest requires respect for the Community legal order. Nevertheless, it is difficult to determine the criterion against which the quality of the case law is to be measured.’⁷⁴⁷

If the CJEU continues to utilise the meta-teleological approach or to circumvent more specific competences in shared competences areas by an expansive interpretation of free movement as, for example, in the cases of *Viking* and *Laval*,⁷⁴⁸ it runs the risk of damaging the quality of its decision making in the eyes of the Member States and national courts, the latter responsible for giving effect in the member state to the rulings of the CJEU. Rather the CJEU could enhance its own

⁷⁴⁵ J.Bengoetxea, *The Legal Reasoning of the European Court of Justice*, (OUP, 1993) 114. For a more general discussion on the importance of courts justifying their decisions through their judicial reasoning see R.Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (trans by R.Adler and N.MacCormack), (Clarendon Press, 1989) 221; N. MacCormick ‘Argumentation and Interpretation in Law’, (1993) 6(1) *Ratio Juris* 16-29.

⁷⁴⁶ Article 2 TFEU. See also chapter 1 and the discussion of how the rule of law has been widely recognised from a procedural viewpoint.

⁷⁴⁷ N.Everling, ‘The ECJ as a Decision Making Authority’ (1992) 82 *Michigan Law Review*, 1294 at 1308.

⁷⁴⁸ See Case C-341/05, *Laval un Partneri Ltd, v Svenska Byggnadsarbetarefobundet*, [2007] ECR I-11767 and Case C-438/05, *The International Transport Workers’ Federation and the Finnish Seamen’s Union v Viking Line ABP and OU Viking Line Esti* [2007] ECR I-10779 discussed by G.Conway, *The Limits of Legal Reasoning and the European Court of Justice*, (CUP, 2012) 49 and who explains how ‘the decisions in *Laval* and *Viking* have brought the right to strike within Union competence, despite the right to collective action being expressly excluded from the social competence of the Community by then Article 137(5) EC Treaty (now Article 153(5) TFEU). The ECJ has held that the right to strike nonetheless falls within the scope of the free movement principle’.

legitimacy through quality decision making by firstly avoiding the meta-teleological approach as a method of interpretation in the future and instead preferring a teleological approach especially where there are gaps in the Treaty and a literal approach to interpretation is not possible.

Secondly to enhance further the legitimacy of the CJEU's ruling for the CJEU to pay more attention to subsidiarity by checking whether the Union has competence to act (conferral) and in cases concerning areas of shared competence to include this in its reasoning. An explicit explanation of how the CJEU had considered subsidiarity in the CJEU's reasoning would help to improve the quality of the reasoning of the CJEU and consequently enhance the legitimacy of the CJEU's ruling.⁷⁴⁹

Thus the review of the cases in this section with reference to relevant academic literature has revealed how the CJEU has frequently tended in its interpretation to display a pro-Union interpretative tendency. Consequently engaging more meaningfully with subsidiarity will not necessarily prevent the CJEU from continuing to display a pro-Union interpretative tendency especially as subsidiarity itself is a contested concept and characterised by a degree of vagueness.⁷⁵⁰ Nevertheless, even if the CJEU inevitably approaches interpretation from a certain perspective, the adoption of a subsidiarity and proportionality review with an explicit explanation of how the CJEU had considered subsidiarity in the CJEU's reasoning would help to improve the quality of the reasoning of the CJEU and consequently enhance the legitimacy of the CJEU's ruling.⁷⁵¹

The next section turns to consider academic support that the CJEU as a law-making institution should be bound by subsidiarity when reviewing cases in the context of the common market. It also considers the question of whether it is possible to identify more fully ex ante criteria for the application of subsidiarity

⁷⁴⁹ N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.'

⁷⁵⁰ This was argued in section 5 of chapter 2.

⁷⁵¹ N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.'

thereby enabling the CJEU to engage more meaningfully with subsidiarity in its judicial reasoning in areas of shared policy outside of judicial review. Further chapters 4 and 5 will focus on how the CJEU could engage more meaningfully with subsidiarity in its judicial reasoning when interpreting shared competence areas in the context of determining the residency rights of migrant EU citizens.

2.3. The CJEU and its approach to subsidiarity when judicially reviewing the EU political institutions

Despite the low numbers of subsidiarity cases brought,⁷⁵² there have been various academic debates which have critiqued the use of subsidiarity by the CJEU when reviewing the actions of the political institutions in law-making. So, for example some commentators have been highly critical of the CJEU arguing that the CJEU has adopted a very low intensity judicial review in this context.⁷⁵³ Other commentators have focused on considering the appropriateness in the first place of using subsidiarity in judicial review on the grounds that subsidiarity is ‘the wrong rule, in the wrong place at the wrong time’.⁷⁵⁴

Arguably two of the most important advantages are preserving localism and respect for cultural diversity of the Member States legal regimes, the latter being substantively different to the former in that a respect for cultural diversity of the Member States legal regimes also involves a respect for the cultural and social diversity that the legal regime is part of. But by respecting these two tenets and including in its reasoning how it had respected these tenets this would help to demonstrate the legitimacy of the CJEU’s rulings⁷⁵⁵ and that it is not getting involved in political judgments that the Member States’ authorities are best placed to decide upon although Berman has pointed out that for the CJEU to pay more attention to subsidiarity when reviewing the EU institutions, ‘require[s] the Court of Justice to play a role to which it is not accustomed namely restraining Community action in the interests of localism.’⁷⁵⁶ The discussion therefore

⁷⁵² P.Craig and G.de Búrca, *EU Law: Text, Cases, and Materials*, (OUP, 5th ed., 2011) 99.

⁷⁵³ Ibid.

⁷⁵⁴ G.Davies, ‘Subsidiarity: the Wrong Idea in the Wrong Place, at the Wrong Time’, (2006) 43 (1) *Common Market Law Review* 66. See also P.Craig, ‘Subsidiarity: A Legal and Political Analysis’, (2012) 50 *Journal Of Common Market Studies* at 82 for a critique of Davies’ view.

⁷⁵⁵ N.Everling, ‘The ECJ as a Decision Making Authority’ (1992) 82 *Michigan Law Review*, 1294 at 1308.

⁷⁵⁶ G.Berman, ‘Taking Subsidiarity Seriously: Federalism in the European Community and the United States’, (1994) 94(2) *Columbia Law Review* 331-456 at 394.

agrees with existing literature that if the EU and the Member States have adopted subsidiarity in the Treaties as a constitutional principle, then the CJEU should pay attention to subsidiarity. The section therefore turns to consider some examples of cases which illustrate how despite the ubiquity of subsidiarity the CJEU has frequently adopted a low intensity subsidiarity review when reviewing cases concerning the EU institutions when law-making.

The first time that subsidiarity was raised in court proceedings and which demonstrated the CJEU's reluctance to pay any attention to subsidiarity when reviewing the EU law making institutions was by the UK in the *Working Time Directive case*.⁷⁵⁷ The UK challenged the legality of the adoption of the Working Time Directive on the basis that the EU had acted ultra vires when adopting this Directive. Pivotal in the argument put forward by the UK was that the Working Time Directive infringed the concept of subsidiarity and that,

‘the Community legislature neither fully considered nor adequately demonstrated whether there were transnational aspects which could not be satisfactorily regulated by national measures, whether such measures would conflict with the requirements of the EC Treaty or significantly damage the interests of Member States or, finally, whether action at community level would provide clear benefits compared with action at national level.....Article 118a should be interpreted in the light of the principle of subsidiarity, which does not allow adoption of a directive in such wide and prescriptive terms as the contested directive, given that the extent and the nature of legislative regulation of working time vary very widely between Member States’.⁷⁵⁸

The Advocate General in reviewing the argument advanced by the UK in paragraph 123 of his opinion clearly distinguished subsidiarity from proportionality opining that these two operate in turn and that ‘the first determines whether community action is to be set in motion, whereas the second defines its scope. Hence the question of competence is dissociated from that of its exercise. In other words, the principle of subsidiarity comes into play before the Community takes action, whilst the principle of proportionality comes into play after such action has been taken’. He then concluded in

⁷⁵⁷ Case C-84/94, *UK v Council* [1996] ECR I-5755.

⁷⁵⁸ *Ibid.*, at para 46.

paragraph 127 and 128 that ‘by relying on the principle of subsidiarity, therefore, the applicant is disputing as a matter of principle the possibility of the Council taking action in the area covered by the contested directive, and not the extent of that power which, for its part, is conditional on compliance with the principle of proportionality. In that regard the actual principle that action may be set in motion by the Community in the areas covered by the contested directive cannot be called in question that initiative could not have been left to the Member States alone’.

The CJEU in its judgment first considered the scope of Article 118 a ruling that ‘Article 118 a confers upon the Community internal legislative competence in the area of social policy. The existence of other provisions in the Treaty does not have the effect of restricting the scope of Article 118 a. Appearing as it does in the chapter of the Treaty which deals with ‘Social Provisions’, Article 118 a relates only to measures concerning the protection of the health and safety of workers. It therefore constitutes a more specific rule than Articles 100 and 100a’. Consequently other provisions of the Treaty here were not capable of restricting the scope of Article 118.

Secondly, the CJEU adopted a broad approach to health and safety in paragraph 15 ruling that ‘there is nothing in the wording of Article 118a to indicate that the concepts of ‘working environment’, safety and health as used in that provision should, in the absence of other indications, be interpreted restrictively, and not as embracing all factors, physical or otherwise, capable of affecting the health and safety of the worker in his working environment, including in particular certain aspects of the organization of working time’.

In relation to the subsidiarity argument advanced by the UK the CJEU then undertook a very limited scrutiny of whether the subsidiarity principle had been breached. Rather, in reaching the decision in this case, the CJEU relied heavily on an argument put forward by the Advocate General in this case that displayed a pro-union interpretative tendency that the subsidiarity test was of limited application where Community harmonization was at issue when it ruled that:

‘[O]nce the Council has found that it is necessary to improve the existing level of protection as regards the health and safety of workers and to harmonise the conditions in this area while maintaining the improvements made, achievement of that objective through the imposition of minimum requirements necessarily presupposes community-wide action’.⁷⁵⁹

It also accepted the Council’s view put forward in this case that the Community’s aims were necessary in this context ‘and reasoned that it would be pointless to require a specific statement of reasons for each of the technical choices made by it.’⁷⁶⁰ Here the CJEU’s reasoning reveals an emphasis on the importance of giving the Council a wide discretion when bringing in legislative measures for Community harmonization of those conditions as illustrated when it ruled that, ‘As to judicial review of those conditions, however, the Council must be allowed a wide discretion in an area which, as here, involves that legislature in making social policy choices and requires it to carry out complex assessments’.⁷⁶¹ Once the CJEU had established that there was a justification for such a wide discretion for the Council when bringing in legislation in this context, it then limited the ambit of its review of the legislative action to merely ‘examining whether it has been vitiated by manifest error or misuse of powers, or whether the institution has manifestly exceeded the limits of its discretion’.⁷⁶² Thus the CJEU paid little attention to subsidiarity and the need to respect localism when reviewing the Council’s action in this context. Furthermore, in respect of its consideration as to whether there was a breach of the proportionality principle in this case, the CJEU also failed to require the Council to produce evidence of how it justified its decision that legislative action was needed in this context i.e. so no requirement to demonstrate that the EU could achieve value-added protection.

The seeds of a development by the CJEU of undertaking a subsidiarity review when reviewing the EU institutions decision to adopt EU legislation can be

⁷⁵⁹ Ibid., para 47.

⁷⁶⁰ Ibid., para 79.

⁷⁶¹ Ibid., para 58.

⁷⁶² Ibid., para 58.

discerned in the *Deposit Guarantees Case*.⁷⁶³ The Directive at issue in the case involved deposit-guarantee schemes. It was adopted under Article 57(2) TEC and its aim stated in paragraph 3 of the CJEU's ruling was to ensure cover was in place for all depositors of all authorised credit institutions, including the depositors of branches of credit institutions that had their head offices in other Member States. This case itself concerned a challenge by Germany of a Directive 94/19/EC on deposit-guarantees which included an argument by Germany that the Community legislator had adopted the wrong Treaty basis and failed to adduce adequate reasons for supranational action in this context⁷⁶⁴ i.e. no requirement to demonstrate that the EU could achieve value-added protection.

Although the Advocate General rejected the argument that subsidiarity applied, the CJEU accepted that regulation of credit institutions was an area of shared competence and therefore subsidiarity did apply. For in paragraph 26 of its ruling it stated, 'In the present case, the Parliament and the Council stated in the second recital in the preamble to the Directive that,

'consideration should be given to the situation which might arise if deposits in a credit institution that has branches in other Member States became unavailable' and that it was 'indispensable to ensure a harmonized minimum level of deposit protection wherever deposits are located in the Community. This shows that, in the Community legislature's view, the aim of its action could, because of the dimensions of the intended action, be best achieved at Community level. The same reasoning appears in the third recital, from which it is clear that the decision regarding the guarantee scheme which is competent in the event of the insolvency of a branch situated in a Member State other than that in which the credit institution has its head office has repercussions which are felt outside the borders of each Member State'.

The CJEU then acknowledged that the view of the Parliament and the Council was in conformity with the principle of subsidiarity when it reasoned that,

⁷⁶³ Case C-233/94 *Germany v Parliament and Council*, [1997] ECR I-2405 22-28 (Deposit Guarantees case)

⁷⁶⁴ *Ibid.*, paragraph 23.

‘it is apparent that, on any view, the Parliament and the Council did explain why they considered that their action was in conformity with the principle of subsidiarity and, accordingly, that they complied with the obligation to give reasons as required under Article 190 of the Treaty. An express reference to that principle cannot be required’.⁷⁶⁵

It also referred in paragraph 26 to recital 2 of the preamble to the Directive where the European Parliament and the Council had concluded that action was needed at Union level. The relevant recital stated, ‘consideration should be given to the situation which might arise if deposits in a credit institution that has branches in other Member States became unavailable’ and that it was ‘indispensable to ensure a harmonized minimum level of deposit protection wherever deposits are located in the Community’. This the CJEU ruled ‘shows that, in the Community legislature’s view, the aim of its action could, because of the dimensions of the intended action, be best achieved at Community level’.⁷⁶⁶

The CJEU then pointed out that the same reasoning appears in the third recital. As it stated ‘from which it is clear that the decision regarding the guarantee scheme which is competent in the event of the insolvency of a branch situated in a Member State other than that in which the credit institution has its head office has repercussions which are felt outside the borders of each Member State’.⁷⁶⁷

Finally it stated in paragraph 27 that ‘Furthermore, in the fifth recital the Parliament and the Council stated that the action taken by the Member States in response to the Commission’s Recommendation has not fully achieved the desired result. The Community legislature therefore found that the objective of its action could not be achieved sufficiently by the Member States’.

Although this provides evidence of the CJEU paying attention to subsidiarity when reviewing the EU institutions decision to adopt this Directive, the CJEU did not demand that this evidence be demonstrated. Thus the ruling in this case

⁷⁶⁵ Ibid., para 28.

⁷⁶⁶ Ibid., para 26.

⁷⁶⁷ Ibid., para 26.

demonstrates that although the CJEU was now prepared to undertake a subsidiarity review of EU institutional action that it was only prepared to adopt a superficial and light touch approach in its review.

A similar tendency is apparent in *Directive 98/44 on the legal protection of biotechnological inventions case*.⁷⁶⁸ The case itself concerned a challenge by the Netherlands on the validity of this Directive. The challenge included an argument that the Directive should be annulled for breach of the principle of subsidiarity.⁷⁶⁹ In particular, it was pointed out by the Netherlands that national patent law had implemented the European Patent Convention.⁷⁷⁰ The Advocate General opined that the Directive in this context was necessary to harmonise Member State law in this context and that the principle of subsidiarity was respected in the Directive, as evidenced by recitals 3,5,6,7, and 9 of the Directive.⁷⁷¹ However, the Advocate General in reaching his opinion on this point did not consider whether there was any evidence to support the EC's decision that it was only the EC that could have acted here. Nor did he consider whether the legislator had unnecessarily restricted national autonomy and the extent to which EC law intervention was proportionate. So it was enough for the legislature to make a formal reference to subsidiarity.

The CJEU also accepted that subsidiarity was respected but it approached a subsidiarity review in a different way to the Advocate General. It first considered that, 'by requiring the Member States to protect biotechnological inventions by means of their national patent law, the Directive in fact aims to prevent damage to the unity of the internal market which might result from the Member States' deciding unilaterally to grant or refuse such protection'.⁷⁷² It then considered the objective of the Directive at issue here as being 'to ensure smooth operation of the internal market by preventing or eliminating differences between the legislature and practice of the various Member States...'.⁷⁷³ Finally, the CJEU weighed up whether action was necessary at supra-national level, concluding that it was on the grounds that the required action 'could not be achieved by action taken by the Member States alone'.⁷⁷⁴

⁷⁶⁸ Case C-377/98, *Netherlands v Parliament and Council*, 2001 ECR I-7079 para 32.

⁷⁶⁹ Ibid para 77 Advocate General's Opinion.

⁷⁷⁰ Case C-377/98, *Netherlands v Parliament and Council*, 2001 ECR I-7079 citing the European Patent Convention (5 October 1973) 1065 UNTS 199; 13 JLM 270.

⁷⁷¹ Ibid.

⁷⁷² Ibid., para 8.

⁷⁷³ Ibid at para 32.

⁷⁷⁴ Ibid.

In reaching this conclusion, it did explicitly acknowledge that compliance with subsidiarity is implicit in the recitals to the Preamble of the Directive when it ruled that ‘in the absence of action at Community level, the development of the laws and practices of the different Member States impedes the proper functioning of the internal market’.⁷⁷⁵ Relying on this wording, the CJEU then reasoned that supranational action was permitted where the aim of the legislation in question was to remove trade barriers, the latter being a key goal connected to the realisation of the internal market. In the CJEU’s view, the existence of such an aim in the contested Directive met the requirements of subsidiarity. Thus, the ruling in this case is another example of where although the CJEU was prepared to undertake a subsidiarity review of EU institutional action, that it was only prepared to adopt a superficial and light touch approach in its review of the internal market. However, the latter can always be understood conceptually as involving joint action. Consequently, the CJEU here by linking subsidiarity to joint action effectively neutralizes subsidiarity in that the CJEU did not consider why greater use of the European Patent Convention might have achieved the same objective.

One of the most notable examples where an argument was put forward by a Member State that a particular Directive was contrary to subsidiarity was the *Tobacco Advertising Case*.⁷⁷⁶ In this latter case Germany argued that that the EU institutions had failed to pay proper attention to subsidiarity when adopting the Tobacco Advertising Directive. In particular they argued that there was little evidence of cross border trade in such products when they submitted that such activities were ‘practically non-existent and [had] to date not been subject to any restrictions’.⁷⁷⁷ Thus they concluded that the EU legislator had neither respected the subsidiarity guidelines nor adduced evidence as to the need for Community action.⁷⁷⁸

⁷⁷⁵ Ibid.

⁷⁷⁶ Case C-376/98 *Germany v Parliament and Council (Tobacco Advertising)*. For a discussion of this case see Kumm, M., ‘Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union’, (2006) 12 (4) *European Law Journal*, pp 503-533.

⁷⁷⁷ Ibid., at para 15.

⁷⁷⁸ Opinion of Advocate General Fennelly delivered on 15 June 2000 in Case C-376/98, *Federal Republic of Germany v European Parliament and Council of the European Union, The Queen v Secretary of State for Health and Others, ex parte Imperial Tobacco Ltd and Others*.

On the question of weighing up whether the EU institutions had failed to pay proper attention to subsidiarity, Advocate General Fennelly undertook a review of the arguments put forward by the applicants that the institutions had paid attention to subsidiarity when adopting the legislation at issue in this case. The Advocate General noted that such arguments included that the legislator in this case had not respected the guidelines on subsidiarity that had been issued by the European Council in 1992 or the inter-institutional agreement of 1993 between the Council, the Parliament and the Commission on procedures for implementing the principle of subsidiarity.⁷⁷⁹ In particular, this required that any action proposed is ‘is as simple as is compatible with the proper attainment of the objective of the measure and the need for effective implementation.’⁷⁸⁰

Furthermore, the Advocate General referred to an argument by the applicants that firstly the EU legislator had failed to consider the principle of subsidiarity that was included in the recitals in the preamble to the Directive. The Advocate General also referred to another argument by the applicants that the EU legislator had made no consideration of any qualitative or quantitative evidence in support of the need for Community action on the grounds that national regulation was insufficient to remedy perceived difficulties with tobacco advertising.⁷⁸¹ Such a subsidiarity based review in his opinion was essential as if there was no evidence of a significant identified need for transnational action, the regulation for advertising should remain with the Member States.⁷⁸²

The Advocate General then considered the argument by the defendants. For the defendants in this case, on the other hand, argued that the Treaty articles at issue in this case were inherently exclusive in character meaning that subsidiarity was not relevant here i.e. exclusive EU competence.⁷⁸³ They further added that the Member States were unable to remove effectively distortions of competition in trade in media and advertising services. Thus they argued that Community action was clearly needed. Furthermore they contended that the existence of such

⁷⁷⁹ Ibid., para 46.

⁷⁸⁰ Inter-institutional Agreement of 1993 between the Council, the Parliament and the Commission on procedures for implementing the principle of subsidiarity [2003] C 321/01 para 12.

⁷⁸¹ Opinion of Advocate General Fennelly delivered on 15 June 2000 in Case C-376/98, *Federal Republic of Germany v European Parliament and Council of the European Union, The Queen v Secretary of State for Health and Others, ex parte Imperial Tobacco Ltd and Others* para 46.

⁷⁸² Ibid., para 46.

⁷⁸³ Ibid., at para 47.

distortions had been clearly assessed by the legislator.⁷⁸⁴ For, as they argued, even if the Treaty articles in this case were not exclusive in character and consequently subsidiarity did apply and the Member States were unable to achieve removal of distortions of competition in trade in this context, the legislator had ‘clearly assessed and reasoned the need for Community action in response to divergent national rules.’ Furthermore, the legislator had then chosen as the legislative instrument here a Directive which leaves the Member States ‘a considerable margin for manoeuvre in many respects’.⁷⁸⁵

In delivering his opinion on this contested issue, a key consideration was identifying the need for Community action where there are different rules at national level which give rise to distortion of competition. As he opined,

‘the coordination or approximation of national rules which affect economic activity is the very essence of these competences, provided it serves the purposes of the internal market, and is not merely an instrument for achieving some separate, materially defined objective. It is clear that only the Community can adopt measures which satisfy these requirements’.⁷⁸⁶

However, how clear was it that only the Community could adopt measures which satisfied such requirements and where was the evidence to support such a view? Kumm has argued that any subsidiarity review should involve the CJEU considering firstly whether there was a legitimate purpose for the particular legislative measures, secondly whether there was a need for such a measure and finally that the ‘EU legislative intervention does not lead to a disproportionate loss of Member States autonomy’.⁷⁸⁷ Only if all three of these criteria are satisfied has the subsidiarity review performed. However, in this case the Advocate General, in determining whether there was a real need here for EC action, failed to ask for evidence to support the EC’s decision that only the EC can act here and which is a key consideration when determining whether the legislator had unnecessarily restricted national autonomy. Rather the Advocate General merely reasoned that there was no need to undertake the difficult test of weighing up the comparative

⁷⁸⁴ Ibid.

⁷⁸⁵ Ibid.

⁷⁸⁶ Ibid., at para 139.

⁷⁸⁷ M.Kumm, (2006) ‘Constitutionalising subsidiarity in Integrated Markets: the Case of Tobacco Regulation in the European Union’ (12(4) ELJ 503-533 at 531.

efficiency between the benefits of EU harmonizing action to promote the internal market on the one hand and Member State regulatory action on the other.⁷⁸⁸ Accordingly, the Advocate General concluded ‘the principle of subsidiarity does not apply, I do not think it is necessary to analyse whether it was observed in this case. I would, therefore, reject this ground of invalidity.’⁷⁸⁹

When the case was heard by the CJEU, however, the CJEU accepted that the adoption of the Directive was contrary to subsidiarity. In particular, it focused on considering whether the EU had gone beyond the limits of the particular Treaty articles at issue in this case, namely Articles 95, 47 and 55 TEC (now Articles 114, 53 and 62 TFEU), when it had adopted the Tobacco Advertising Directive.⁷⁹⁰ Firstly, the CJEU interpreted Article 110a in light of Article 3(c) as,

‘intended to improve the conditions for the establishment and functioning of the internal market. To construe that article as meaning that it vests in the Community legislature a general power to regulate the internal market would not only be contrary to the express wording of the provisions cited above but would also be incompatible with the principle embodied in Article 3 b of the EC Treaty (now Article 5EC) that the powers of the Community are limited to those specifically conferred on it’.⁷⁹¹

Rather the CJEU reasoned any measure adopted in this context must ‘genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market’.⁷⁹²

Pivotal in the CJEU’s examination here was to determine whether the Directive actually contributed to the elimination of obstacles to the free movement of goods and removing distortions of competition by adopting a threshold for distortions to the market as being at least appreciable rather than undertaking a subsidiarity review.⁷⁹³ However, as Kumm points out, the omission of the CJEU to consider and explain the relevance of the subsidiarity principle in this case, means that ‘the

⁷⁸⁸ Opinion of Advocate General Fennelly delivered on 15 June 2000 in Case C-376/98, *Federal Republic of Germany v European Parliament and Council of the European Union, The Queen v Secretary of State for Health and Others, ex parte Imperial Tobacco Ltd and Others* at para 142.

⁷⁸⁹ *Ibid.*

⁷⁹⁰ Case C-376/98, *Federal Republic of Germany v European Parliament and Council of the European Union, The Queen v Secretary of State for Health and Others, ex parte Imperial Tobacco Ltd and Others* paras 76-89.

⁷⁹¹ *Ibid.*, para 83.

⁷⁹² *Ibid.*, para 84.

⁷⁹³ *Ibid.*, para 109.

Court of Justice has not yet adopted a doctrinal framework that effectively operationalises the Treaty's commitment to subsidiarity and proportionality in the context of the common market.⁷⁹⁴ It also means, as Craig and De Búrca write, that 'the CJEU will not lightly overturn EU action on the ground that it does not comply with subsidiarity'.⁷⁹⁵

However, in the case of *Germany v European Parliament and Council* (2nd Tobacco Advertising case),⁷⁹⁶ the CJEU, in considering the validity of Directive 2001/37/EC, extended its judicial review to considering whether the Directive violated the principle of subsidiarity. Consideration by the CJEU, however, again remained on a formalistic level of consideration with little evaluation of the evidence of the level of harmonisation that was needed.

The case came before the CJEU as a preliminary reference concerning the validity of the Directive. The Directive itself was a harmonizing Directive concerning the manufacture, sale and presentation of tobacco products. The CJEU included in its deliberations a consideration of the three main harmonizing provisions of the Directive, namely Articles 3, 5 and 7. Article 3 harmonised the maximum tar, nicotine and carbon monoxide yields in cigarettes and imposed a prohibition on the manufacture of such products that exceeded these limits. Article 2 made provision for various labelling requirements for such products and Article 7 prohibited the use on tobacco products of certain descriptions which might indicate that a product is less harmful than other such products.

Although the applicants claimed that the Directive breached the principle of subsidiarity this was rejected by the CJEU. In particular the CJEU reasoned that 'The Directive's objective is to eliminate the barriers raised by the differences which still exist between the Member States' laws...Such an objective cannot be sufficiently achieved by the Member States individually and calls for action at

⁷⁹⁴ M.Kumm, (2006) 'Constitutionalising subsidiarity in Integrated Markets: the Case of Tobacco Regulation in the European Union' (12(4) ELJ 503-533 at 502.

⁷⁹⁵ Craig and de Búrca, Op.Cit. at 104.

⁷⁹⁶ Case C-491/01, *British American the Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial tobacco Ltd*, 2002 ECR I-11453. See also D.Slater, 'The Scope of EC Harmonising Powers Revisited?' (2003) 4(2) German Law Journal 137-147.

Community level.’⁷⁹⁷ Here the CJEU sets a minimal criterion of removing barriers as an end in itself, whereas the essence of a subsidiarity review is to subject that criterion to scrutiny. Thus the CJEU’s consideration of whether the EU legislator had respected subsidiarity remains very formalistic. It did not examine alternative approaches or apply any serious necessity element of a subsidiarity test. The CJEU also failed to call for evidence of the EU legislators’ subsidiarity review prior to law making in order to determine to what extent should Community harmonization in an area of shared competence be required for such action.⁷⁹⁸

This section of the chapter has reviewed a selection of key cases where the CJEU has undertaken a subsidiarity review when undertaking judicial review of EU legislative action by the EU law making institutions. In all the cases examined the CJEU is progressively paying more attention to subsidiarity when reviewing EU legislative action by the EU institutions. However such review of EU legislative action by the CJEU is invariably light touch, with the CJEU frequently employing a very cursory approach to its examination of the EU institutions’ decision that harmonizing legislation is required. The CJEU formally respects it, but not really in substance. The CJEU relates subsidiarity to the idea of the internal market and displaying a pro-union interpretative tendency treats advancement of the internal market as an end in itself, which is bound to neutralise subsidiarity. In the cases selected the judgments of the CJEU reviewing EU political institutional legislative action are also characterized by a formalistic approach when considering if the EU

⁷⁹⁷ Case C-491/01 181-82.

⁷⁹⁸ The low level intensity of the CJEU’s review of the Directive at issue in this case stands in contrast to the more intensive review undertaken by firstly the Advocate General opinion in Case C-491/01, *British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*, 2002 ECR I-11453 where he opined at para 22 that ‘the Community legislature derives its powers from the realisation of the internal market. Those powers can, none the less, be exercised with a view to protecting a matter of public interest, such as public health in the present case. The measures adopted must in fact be appropriate for abolishing existing or at least probable obstacles to free movement. In exercising its powers the Community legislature is faced with the same evaluation as the national legislature when it intends, for the protection of a matter of public interest, to impose prior conditions on the economic freedom of market participants’. Secondly, Advocate General Fennelly in Case C-376/98 *Germany v Parliament and Council (Tobacco Advertising)* paras 119-120 who opined that ‘although the legislation at issue affected the functioning of the internal market, that effect was not sufficient for Article 100A of the Treaty to apply where that effect is merely incidental’ before concluding that the Community legislator had manifestly exceeded its discretion in adopting the Advertising Directive as a measure to secure undistorted competition in the tobacco advertising and sponsorship sector.

institutions have paid proper attention to subsidiarity, with little consideration of the substantive evidence that Union harmonization is needed.⁷⁹⁹

3. How to apply Kumm's argument that the CJEU should operationalize subsidiarity by employing subsidiarity and proportionality applied to competences as a tool of judicial review

It was explained in chapter 1 how Kumm argues a subsidiarity and proportionality review involves considering whether there should be a legitimate purpose for Union intervention explicitly stated and evidenced as required by Article 5(2) TEU. The latter article requires that 'the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by Member States...but rather, by reason of the scale or effects of the proposed action, be better achieved at the Union Level.'⁸⁰⁰ Furthermore, Kumm argues, with reference to the *Tobacco Advertising* and *Working Time cases*,⁸⁰¹ that a subsidiarity and proportionality review involves considering whether that the Union internal market measure decided upon by the EU law-making institutions is

⁷⁹⁹ Although the EU political institutions are tasked with the making of primary legislation they are not necessarily entitled to the same degree of deference by the CJEU that a national political law-making institution has in the UK, for example, from their national courts as the UK which has only one supreme legislative body in the UK, the UK Parliament. Here the traditional view put forward by A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, (8th ed., London: Macmillan, 1915) -the doctrine of Parliamentary sovereignty - is that the Parliament is the supreme law-maker. This doctrine has been respected and recognised by the national UK courts as requiring judges to defer to the will of Parliament when interpreting statute law as evidenced in *British Railways Board v Pickin*, [1974] AC 765 per Lord Reid although there have been some judicial statements which suggest that Parliament's powers might be struck down where fundamental constitutional rights are concerned by Lord Hope in *Jackson V Attorney General*, [2006] 1 AC 262 para 107 when he stated 'it is of the essence of supremacy of the law that the courts shall disregard as unauthorised and void the acts of any organ of government, whether legislative or administrative, which exceed the limits of the power that organ derives from the law. In its modern form, now reinforced by the European Convention on Human Rights and the enactment by Parliament of the Human Rights Act 1998, this principle protects the individual from arbitrary government. The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based.' For a wider theoretical discussion of the allocation of power between the judiciary and the legislature and the extent to which an unelected judiciary should be able to overturn legislation that is in breach of constitutionally protected rights see for example A. Young, 'Deference, Dialogue and the Search for Legitimacy', (2010) 30(4) 815-831'.

⁸⁰⁰ Kumm Op.Cit 519.

⁸⁰¹ Case C-376/98 *Germany v Parliament and Council (Tobacco Advertising case)*; Case C-84/94 *UK v Council* [1996] ECR I-5755.

the minimum necessary to deal with the problem identified.⁸⁰² Finally, Kumm argues that a subsidiarity and proportionality review involves considering the extent of the effect of a Union measure on autonomy of the Member State and the practical effect on the legal systems of the Member States and that this should not be out of proportion to the result achieved by the Union measure.⁸⁰³ This inevitably requires the CJEU to undertake a balancing test. But as Kumm points out, citing the example of the *Swedish Match* case⁸⁰⁴, the CJEU has failed to undertake a balancing test.⁸⁰⁵ As he writes, ‘even though Article 5 (3) specifically mentions the principle of proportionality in the context of the conferral of powers and the commitment to subsidiarity, the Court of Justice did not engage proportionality as part of the jurisdictional enquiry...it did not connect that analysis to the legitimate purpose of federal intervention.’⁸⁰⁶

Nevertheless, despite the importance Kumm places on undertaking such analysis, Kumm does not consider how the CJEU should undertake such a balancing exercise or whether different policy areas require different considerations. Nor does he specify exactly what the criteria should be or what factors the CJEU should take into account when undertaking such a balancing exercise. This is a significant omission as ‘balancing represents a different kind of thinking. The focus is directly on the interests or factors themselves. Each interest seeks recognition of its own and poses a head to head comparison with competing interests’.⁸⁰⁷ Building upon this argument by Kumm, this section therefore explains the steps the CJEU could have taken in the judicial review cases considered in this section.

So, for example, in respect of the *Working Time Directive* case, here the CJEU in undertaking a subsidiarity and proportionality review would firstly need to address first whether there was a legitimate purpose for Union intervention as required by Article 5 TEU. This would require the CJEU to identify the relevant Treaty provision that the Working Time Directive⁸⁰⁸ was adopted under. As the

⁸⁰² Kumm Op.Cit at 521.

⁸⁰³ Kumm Op.Cit at 522.

⁸⁰⁴ *Case C-210/03, Swedish Match AB and Swedish Match UK Ltd. v. Secretary of State for Health.*

⁸⁰⁵ Kumm Op.Cit at 522.

⁸⁰⁶ Kumm Op.Cit at 523.

⁸⁰⁷ T.Aleinikoff, ‘Constitutional Law in the Age of Balancing’, [1987] 96 Yale Law Journal 943 at 945.

⁸⁰⁸ Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time OJ 1993 L 307, p.18.

relevant Treaty article here was Article 118 a TEC, this would include considering whether the Council had the right to exercise competence under Article 118 a TEC in line with the principle of conferral, which is now provided for in Article 5 (2) TEU. It would also include considering data that the EU institutions had relied upon in support of their decision that there was a legitimate purpose for Union intervention. This could, for example, include scientific and medical data e.g. data regarding the health implications for long working hours. It could also include empirical data on the different approaches of the Member States to working time limits, night working etc and any data on the financial implications of regulating working time.

Secondly, Kumm points out that Article 5 (3) specifically mentions the principle of proportionality in the context of the conferral of powers and the commitment to subsidiarity.⁸⁰⁹ Thus, once a legitimate purpose was established, according to Kumm, the CJEU would then need to ‘connect that analysis to the legitimate purpose of federal intervention.’⁸¹⁰ This could be achieved by the CJEU considering if the EU law-making institutions had considered any data projecting an estimate of the scale and effect of such legislation and, if so, how the EU institutions had evaluated this and concluded that legislative action in this context had tipped the balance in favour of Union intervention. This would necessarily involve the CJEU reviewing the EU institutions decision here that the legislation adopted was the minimum necessary to deal with the problem. This goes beyond merely looking at the purpose of the measure to considering the proportionality of such a measure. This would also involve the CJEU checking that the EU institutions adopted legislation that was not only the minimum necessary to deal with the problem but also proportional to the result to be achieved in light of any practical effects on the Member States e.g. in this particular case the implications for businesses and government of limiting working time hours. In performing this review, the CJEU could adopt a balance of probability threshold.

In the *Deposit Guarantees Case*⁸¹¹, too the CJEU in undertaking a subsidiarity and proportionality review would firstly need to address first whether there was a legitimate purpose for Union intervention as required by Article 5 TEU. This

⁸⁰⁹ Kumm Op.Cit at 523.

⁸¹⁰ Kumm Op.Cit at 523.

⁸¹¹ Case C-233/94 *Germany v Parliament and Council*, [1997] ECR I-2405 22-28 (Deposit Guarantees case).

would require the CJEU to identify the relevant Treaty provisions both the general ones and the specific ones, here Directive 94/19/EC⁸¹² and considering whether the Council had the right to exercise competence under in line with the principle of conferral, which is now provided for in Article 5 (2) TEU. It would also include requiring data that the EU institutions had relied upon in support of their decision that there was a legitimate purpose for Union intervention. This could, for example, include providing empirical data that Union action was needed in this context to substantiate the claim made in recital 2,

‘to ensure a harmonized minimum level of deposit protection wherever deposits are located in the Community’ to deal with the problem in recital 3 that in the event of the insolvency of a branch situated in a Member State other than that in which the credit institution has its head office [there are] repercussions which are felt outside the borders of each Member State’.⁸¹³

Once a legitimate purpose was established, according to Kumm, the CJEU would then need to ‘connect that analysis to the legitimate purpose of federal intervention.’⁸¹⁴ This could be achieved by the CJEU considering if the EU law-making institutions had considered any data projecting an estimate of the scale and effect of such legislation and, if so, how the EU institutions had evaluated this and concluded that legislative action in this context had tipped the balance in favour of Union intervention. This would necessarily involve the CJEU reviewing the EU institutions decision here that the legislation adopted was the minimum necessary to deal with the problem. Here the CJEU should look beyond any assertion by the legislature about proportionality i.e. it should adopt a more evidence-based assessment of proportionality. It would also involve the CJEU checking that the EU institutions adopted legislation that was not only the minimum necessary to deal with the problem but also proportional to the result to be achieved in light of any practical effects on the Member States e.g. any financial implications for businesses of harmonized minimum level of deposit protection wherever deposits are located in the Community. In this particular case

⁸¹² Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes (OJ 1994 L 135, p. 5).

⁸¹³ Case C-233/94 *Germany v Parliament and Council*, [1997] ECR I-2405 22-28 (Deposit Guarantees case) para 26.

⁸¹⁴ Kumm Op.Cit. at 523.

the CJEU would need to require evidence of data to substantiate its claims that Union action was needed and was the minimum necessary to deal with the problem to support the claim in recital 2. This would require a cost-benefit analysis involving relevant expert evidence on the practical effects on the Member States of harmonized minimum level of deposit protection. Again, in performing this review, the CJEU could adopt a balance of probability threshold.

In the *Biotechnological Inventions* case, again the CJEU in undertaking a subsidiarity and proportionality review would firstly need to address first whether there was a legitimate purpose for Union intervention as required by Article 5 TEU. This would require the CJEU to identify the relevant Treaty provisions both the general ones and the specific ones, here Directive 98/44/EC⁸¹⁵ The Directive was adopted on the basis of Article 100a of the EC Treaty (now, after amendment, Article 95 EC). Its purpose was to require the Member States, through their patent laws, to protect biotechnological inventions, whilst complying with their international obligations. So the purpose limb of the test is satisfied.

The CJEU would then need to consider firstly whether the Council had the right to exercise competence in line with the principle of conferral, which is now provided for in Article 5 (2) TEU. Secondly, to require evidence of the data that the EU institutions had relied upon in support of their decision that there was a legitimate purpose for Union intervention. This could, for example, include providing empirical examples that Union action was needed in this context to substantiate claim by the Parliament and the Council referred to in paragraph 16 of the CJEU judgement that,

‘even if the relevant national provisions predating the Directive are most often taken from the Convention on the Grant of European Patents, signed at Munich on 5 October 1973, (hereinafter ‘the EPC), the differing interpretations to which those provisions are open as regards the patentability of biotechnological inventions are liable to give rise to divergences of practice and case-law prejudicial to the proper operation of the internal market’.

⁸¹⁵ Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions OJ 1998 L 213, p. 13.

Such evidence might include data showing differences between Member States' laws e.g. differences in Member States' laws regarding the extent to which biotechnical inventions are patentable or differing views as to what types of biotechnical invention are regarded as contrary to public policy. The CJEU would also have to consider views of the Member States as the Directive will require Member States to protect biotechnological inventions under national patent law which may require them to adjust their national patent law to take account of the provisions of this Directive.⁸¹⁶

Once a legitimate purpose was established, according to Kumm, the CJEU would then need to 'connect that analysis to the legitimate purpose of federal intervention.'⁸¹⁷ Here Kumm is focusing on the first limb of the test, legitimate purpose, rather than considering the other limbs he identified: 2. Necessity, 3. Proportionality.⁸¹⁸ On the other hand, the latter could be achieved by the CJEU considering if the EU law-making institutions had considered any data projecting an estimate of the scale and effect of such legislation on national legislation of the Member States and, if so, how the EU institutions had evaluated this and concluded that legislative action in this context had tipped the balance in favour of Union intervention. In this particular case the CJEU would need to examine evidence of data which illustrates that the patentability of biotechnological inventions are liable to give rise to divergences of practice and case-law prejudicial to the proper operation of the internal market and determine some way of measuring impact beyond a minimis impact (e.g. appreciable impact threshold as in the *Tobacco Advertising case*). The CJEU would also have to consider views of the Member States as the Directive will require Member States to protect biotechnological inventions under national patent law which may require them to adjust their national patent law to take account of the provisions of this Directive.⁸¹⁹ Again, in performing this review, the CJEU could adopt a balance of probability threshold.

In respect of the *Tobacco Advertising case*, although the decision in this case was on the legal basis, not subsidiarity, the logic of the ruling is consistent with

⁸¹⁶ Ibid Article 1 (1).

⁸¹⁷ Kumm Op.Cit. at 523.

⁸¹⁸ Kumm Op.Cit at 519.

⁸¹⁹ Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions OJ 1998 L 213, p. 13 Article 1 (1).

applying subsidiarity. However, there was no explicit subsidiarity review. Kumm has argued that any subsidiarity review should involve the CJEU considering firstly whether there was a legitimate purpose for the particular legislative measures, secondly whether there was a need for such a measure and finally that the ‘EU legislative intervention does not lead to a disproportionate loss of Member States autonomy’.⁸²⁰ Only if all three of these criteria are satisfied has the subsidiarity review performed.

As neither the CJEU or the Advocate General in this case undertook an in depth subsidiarity review, it is proposed that the CJEU in undertaking a subsidiarity and proportionality review would firstly need to address whether there was a legitimate purpose for Union intervention as required by Article 5 TEU. This would require the CJEU to identify the relevant Treaty provisions both the general ones and the specific ones. The specific Directive here was Directive 98/43/EC.⁸²¹ The Directive was adopted on the basis of Article 57(2) of the EC Treaty (now, after amendment, Article 47(2) EC), Article 66 of the EC Treaty (now Article 55 EC) and Article 100a of the EC Treaty (now, after amendment, Article 95 E). This would include considering whether the Council had the right to exercise competence in line with the principle of conferral.⁸²² The CJEU would therefore need to examine the data that the EU institutions had relied upon in support of their decision that there was a legitimate purpose for Union intervention and the ultimate decision by the law-making institutions to adopt the Directive. In particular, they could ask for evidence to be produced for example to support the claim made by the Parliament and the Council and referred to by the CJEU in paragraph 9 of the CJEU’s in relation to ‘problems of the cross-border aspects of advertising via free distribution, which forms part of a uniformly defined advertising concept put into effect for a particular brand’ and how ‘the prohibition of promotional gifts is justified by the need to prevent circumvention of the rules’.

Once a legitimate purpose was established, according to Kumm, the CJEU would then need to ‘connect that analysis to the legitimate purpose of federal

⁸²⁰ Kumm Op.Cit. at 531.

⁸²¹ Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products OJ 1992 L 213, p. 9.

⁸²² Article 5 (2) TEU

intervention.’⁸²³ This could be achieved by the CJEU considering if the EU law-making institutions had considered any data projecting an estimate of the scale and effect of such legislation and, if so, how the EU institutions had evaluated this and concluded that legislative action in this context had tipped the balance in favour of Union intervention. This would necessarily involve the CJEU reviewing the EU institutions decision here that the legislation adopted was the minimum necessary to deal with the problem. It would also involve the CJEU checking that the EU institutions adopted legislation that was not only the minimum necessary to deal with the problem but also proportional to the result to be achieved in light of any practical effects on the Member States . Again, in performing this review, the CJEU could adopt a balance of probability threshold.

In respect of *the second Tobacco Advertising case*, pursuant to Article 5 (2) TEU, again the CJEU would need to identify the relevant Treaty provisions both the general ones and the specific ones. In relation to the specific Directive, this concerned Directive 2001/37/EC.⁸²⁴ Thus the CJEU would need to consider whether the Council had the right to exercise competence under in line with the principle of conferral, which is now provided for in Article 5 (2) TEU. Then it would need to examine data that the EU institutions had relied upon in support of their decision that there was a legitimate purpose for Union intervention. This could, for example, include empirical data that Union action was needed in this context to substantiate the claim made in the second and third recitals in the preamble to the Directive and referred to in paragraph 6 of the CJEU’s ruling in this case that, ‘there are still substantial differences between the Member States’ laws, regulations and administrative provisions on the manufacture, presentation, and sale of tobacco products which impede the functioning of the internal market, and those barriers ought to be eliminated by approximating the rules applicable in that area.’

Secondly, Kumm points out that Article 5 (3) specifically mentions the principle of proportionality in the context of the conferral of powers and the commitment to

⁸²³ Kumm Op.Cit. at 523.

⁸²⁴ Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products OJ 2001 L 194, p. 26. The Directive was adopted on the basis of Articles 95 EC and 133 EC and is aimed at recasting Directives 89/622 and 90/239 by amending and adding to their provisions.

subsidiarity.⁸²⁵ This could be achieved by the CJEU considering if the EU law-making institutions had considered any data projecting an estimate of the scale and effect of such legislation and, if so, how the EU institutions had evaluated this and concluded that legislative action in this context had tipped the balance in favour of Union intervention. This would necessarily involve the CJEU reviewing the EU institutions decision here that the legislation adopted was the minimum necessary to deal with the problem and also proportional to the result to be achieved in light of any practical effects on the Member States and in light of evidence submitted in this case. Again, in performing this review, the CJEU could adopt a balance of probability threshold.

Thus so far this chapter has considered whether subsidiarity has impacted on the CJEU in its interpretative role when interpreting areas of shared competence. This is an important question which the drafters of the Maastricht Treaty, where subsidiarity was first introduced formally into EU law, did not specifically address. This was despite the fact that it was considered by the European Parliamentary committee in the lead up to the Maastricht Treaty.⁸²⁶ It has also included a section which has briefly reconstructed various judicial review cases in order to illustrate how Kumm's argument that the CJEU should operationalize subsidiarity by employing subsidiarity and applied to competences as a tool of judicial review. An illustration of how such a subsidiarity and proportionality review could be useful is to apply the proposed subsidiarity and proportionality review using *Bosman case*⁸²⁷ discussed below. This case was also considered earlier in section 4 of this chapter and involved considering whether Article 48 TFEU applied to rules laid down by national sporting associations. It was also an example of where the CJEU in that case did consider in para 81 whether 'national

⁸²⁵ Kumm Op.Cit. at 523.

⁸²⁶ European Parliament Committee on Institutional Affairs, Interim Report on the Principle of Subsidiarity, European Parliament Document A3-163/90 (June 1990). More recently the Opinion of the Committee on constitutional Affairs for the Community on legal affairs on the 18th Report on better legislation – Application of the Principle of Subsidiarity and Proportionality 2011/2276(INI) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONGML%2bCOMPARL%2bPE-483.487%2b02%2bDOC%2bPDF%2bV0%2f%2fEN> accessed 30.4.13 has also considered that 'there has been only one judgment by the European Court of Justice on proportionality and subsidiarity in the reporting period ('roaming' in mobile telephony), noting that Court found that there was no breach of either of these two principles in this case as it was necessary to limit prices for final consumers in order to protect their interests, and as this objective was best achieved at Union level'.

⁸²⁷ Case C-415/93 *Bosman* [1995] ECR I-4921.

rules [are] within the field of application of EU law'. In particular, it ruled that article 48 applied not only 'to the action of public authorities but extends also to rules of any other nature aimed at regulating gainful employment in a collective manner'. Furthermore the CJEU considered in para 84 that,

'if the scope of Article 48 of the Treaty were confined to acts of a public authority there would be a risk of creating inequality in its application.... That risk is all the more obvious in a case such as that in the main proceedings in this case in that.... the transfer rules have been laid down by different bodies or in different ways in each Member State'.

However, although this does demonstrate the CJEU paying some attention to the scope and ambit of Article 48 TFEU, it is proposed, using this case as an example, that the CJEU needs to more meaningfully engage with subsidiarity and proportionality in its judicial reasoning. A more explicit explanation of how the CJEU had considered subsidiarity in the CJEU's reasoning would help to improve the quality of the reasoning of the CJEU and consequently enhance the legitimacy of the CJEU's ruling.⁸²⁸

In the context of the *Bosman* case, it is proposed firstly that this could include the CJEU identifying limits to the competences through subsidiarity analysis and making explicit reference in its reasoning to how it has respected subsidiarity and demonstrated a respect for localism. Secondly, it is proposed that this would involve the CJEU considering if there were genuinely European standards here and being explicit in its reasoning about when it is acting on the edge of its competence in an area of shared area of competence. Finally, it is proposed that this would involve the CJEU stating whether any relevant qualitative or quantitative evidence in relation to the effect on the internal market of rules laid down by sporting associations had been considered and, if so, how it had been assessed and weighed up against relevant qualitative or quantitative evidence concerning the effect of Article 48 TFEU on rules laid down by sporting associations.

⁸²⁸ N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.'

Furthermore, the CJEU could also liaise with the national referring court or a national research body to ascertain the national views as to whether there are any local circumstances requiring additional consideration.⁸²⁹ Adopting this approach would help inform the CJEU in reviewing the institutions decision regarding the extent to which the need for Union action outweighs the respect for local law making inherent in subsidiarity. Engaging more meaningfully with subsidiarity will not necessarily prevent the CJEU from continuing to display a pro-union interpretative tendency especially as subsidiarity itself is a contested concept and characterised by a degree of vagueness.⁸³⁰ Nevertheless, even if the CJEU inevitably undertakes review of the political institutions from a certain perspective, the adoption of a subsidiarity and proportionality review would help with an explicit explanation of how the CJEU had considered subsidiarity in the CJEU's reasoning would help to improve the quality of the reasoning of the CJEU and consequently enhance the legitimacy of the CJEU's ruling.⁸³¹

To give a hypothetical example, suppose that the EC Commission was to propose a Directive, to be adopted under Article 95 TFEU, standardising rules concerning the placing on the market size and type of electrical plugs to fit a particular socket outlet. The reasoning for this was to enhance the free movement of electrical products and that the UK was opposed to this on the grounds that there is a different size and type of plug and socket outlet in use in the UK to many other countries in Europe. The CJEU in considering a challenge by the UK to the adoption of such a Directive would need to undertake a subsidiarity and proportionality review along the following lines.

Firstly the CJEU would need to consider whether the Council had the right to exercise competence in line with the principle of conferral, which is now provided

⁸²⁹ A similar idea has been mooted in the context of the European Court of Human Rights where there has been discussion of creating a Research Division within the ECHR's Registry by S.Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (2006) 189. See also G.Rutherglen, 'Title VII Actions', (1980) 47 U Ch LR at 713 for how elaborate statistical evidence has been vital in the development of disparate impact cases in America when considering justifications put forward by Member States for their state social security rules.

⁸³⁰ This was argued in section 5 of chapter 2.

⁸³¹ N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.'

for in Article 5(2) and the relevant Treaty basis for the Directive. Where the relevant Treaty basis proposed is Article 95 TFEU this is a piece of harmonising legislation subject to subsidiarity.⁸³²

Secondly, the CJEU would need to require evidence to be adduced of the data that the EU institutions had relied up on support of their decision that there was a legitimate purpose for Union intervention. This could, for example, include providing empirical examples that Union action was needed in this context to substantiate any claim that legislation was needed in this context.

Thirdly the CJEU would need to consider the proportionality here of having a Directive in this context. This would require a cost-benefit analysis involving relevant expert evidence on the practical effects on the Member States of such a Directive. It could be achieved by the CJEU considering if the EU law-making institutions had considered any data projecting an estimate of the scale and effect of such legislation on the Member States' regulation on existing standards of size and type of electrical plug and, if so, how the EU institutions had evaluated this and concluded that legislative action in this context had tipped the balance in favour of Union intervention. In particular, the EU institutions could have examined evidence of data which illustrates the advantages of having a standard size and type of plug, the extent of diversity between Member States as to different sizes and types of electrical plugs to fit differing socket outlets⁸³³ and any pertinent data on estimates of the considerable financial implications for Member States of having a standard size and type of electrical plug and socket outlet. It would also need to consider what added value the EU could bring here in that manufacturers of electrical goods in the EU would only have to produce one type of plug for all Member States. This would help to minimise costs for manufacturers in that they would only have to manufacture electrical goods using one particular type of plug.

⁸³² See *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*. [2002] ECR I-111453

⁸³³ See World Electricity Standards <<http://www.quantumbalancing.com/worldelectricity/electricityif.htm#plugs>> accessed 20.1.15.

On the other hand, it would also need to consider if a Member State such as the UK could deal with the issue in some way itself by allowing the use of adapters to enable non-compliant plugs of an appliance to be plugged into a socket outlet of a particular Member State or, for example, why easily available adapters could not address the issue. Such adapters are readily available and relatively cheap for consumers but less convenient in that if you were a holiday maker traveling to a few countries where there were various different types of plugs you might need to purchase several adapters. In performing this review, the CJEU could adopt a balance of probability threshold. With this in mind, the next section reviews academic support that the CJEU as a law-making institution should be bound by subsidiarity in the context of the common market.

4. Academic support that the CJEU as a law-making institution should be bound by subsidiarity in the context of the common market.

This section reviews the academic debate on the matter in more depth and in particular considers how there has been some academic support that the CJEU as a law-making institution should be bound by subsidiarity in the context of the common market. For as Kumm argues, ‘if a constitution establishes the principles of subsidiarity and proportionality as legal principles, questions of competences are closely tied up with questions of regulatory policy. This means that the Treaty carves out a powerful role for the Court of Justice to assess the jurisdictional reasonableness of market intervention when reviewing whether the EU was legally competent to act’.⁸³⁴ Craig and De Búrca also have pointed the ‘act of interpretation itself can constitute the exercise of law-making power by the Court’.⁸³⁵ However, in respect of how the subsidiarity principle might be operationalized by the CJEU, they point out, ‘yet it is unclear whether or how the subsidiarity principle might affect this particular exercise of judicial power’.⁸³⁶

Berman too argues that for subsidiarity to be taken seriously as a political obligation that the CJEU needs to engage with this principle in its interpretation in shared areas of competence. As he succinctly puts it ‘subsidiarity should be

⁸³⁴ M.Kumm Op.Cit 504.

⁸³⁵ De Búrca Op.Cit. at 222.

⁸³⁶ De Búrca Op.Cit. at 222. Kumm Op.Cit. at 504 also points out that ‘the Court of Justice has not yet adopted a doctrinal framework that effectively operationalizes the Treaty’s commitment to subsidiarity and proportionality in the context of the common market’.

practised not preached'.⁸³⁷ Horsley, drawing on such literature, has explained how there are two dimensions when considering the implications of the CJEU paying more attention to subsidiarity.⁸³⁸ The first dimension, he argues, relates to whether the CJEU should pay attention to subsidiarity in all its interpretation of EU law or whether the CJEU should only pay attention to subsidiarity in limited contexts. Here he contends that, although the CJEU enjoys a right of interpretation in Article 5(2) TEU, such interpretation by the CJEU must involve interpreting law within a policy area that is held concurrently between the Member States and the Union. Thus although as Horsley points out the CJEU is only acting as a Union institution for the purposes of Article 5(3) TEU when it is interpreting,⁸³⁹ the CJEU's power in interpretation is itself subject to a legitimacy inquiry in light of the fundamental values of the EU, including subsidiarity and the rule of law.

Secondly Horsley considers in practice where the CJEU is bound by the subsidiarity principle in its interpretation as to how in practice it should pay attention to subsidiarity. Here Horsley points out that there are various practical problems. In particular, he argues that even where the CJEU is bound by the subsidiarity principle, 'the application of the subsidiarity principle may seem entirely inappropriate in certain contexts. Its logic may challenge core policy objectives set out in the Treaties'.⁸⁴⁰ However, this perhaps understates the situation as the Treaty of Rome provisions include on one hand the references to the idea of an ever closer Union and on the other the recognition of continuing sovereignty competences of the Member States. The inclusion of diametrically opposing tenets in the Treaty of Rome was inevitably going to lead to tensions from the outset between the EU and the idea of an ever closer Union and the recognition of the continuing sovereignty competences of the Member States in areas where the EU and the Member States share competence i.e. subsidiarity must some of the time tilt the balance in favour of Member State competence. It was for this very reason precisely why subsidiarity was included later in the

⁸³⁷ See G.A.Berman, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States', (1994) 94(2) Columbia Law Review pp331-456; G.De Búrca, 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor', (1998) 36 (2) Journal of Common Market Studies 217-35 'at 217; T.Horsley, 'Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw', (2011) Journal of Common Market Studies 11-15.

⁸³⁸ T.Horsley, 'Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?', (2011) Journal Of Common Market Studies, 1-16.

⁸³⁹ Ibid., at 9.

⁸⁴⁰ T.Horsley, 'Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?', (2011) Journal Of Common Market Studies, 1-16.

Treaty following the Treaty of Maastricht to help guide the EU institutions when law-making in areas of shared competence. Consequently, subsidiarity must have an important role to play in the CJEU's interpretation in areas of shared competence⁸⁴¹ and in particular the performing of a subsidiarity review where it not only pays formal respect to subsidiarity but also ensures that it respects the substance of subsidiarity. Otherwise subsidiarity is of no legal value, despite its apparent centrality to the negotiation of the Maastricht Treaty.⁸⁴²

Relatedly, and as Horsley has argued, for the CJEU to pay attention to subsidiarity in its interpretation this is possible on the grounds that 'the fact that the Court undermines its own legitimacy as a Union institution where it acts contrary to the demands of the subsidiarity principle'.⁸⁴³ Furthermore, he highlights that there is some support already in the CJEU's case law on the operation of subsidiarity as a restraint on the CJEU's own functions. So, for example, in *Bosman*,⁸⁴⁴ also discussed above at pages 174-5, the CJEU was requested to pay attention to subsidiarity in response to an argument raised by one of the parties in this case and it accepted the principle of subsidiarity as applicable.

Mr Bosman was a professional footballer who challenged the legality of various rules concerning the transfer of professional footballers on the grounds that they were contrary to Article 45 TFEU. During the appeal proceedings in the national case a preliminary reference was made from the Cour d'Appel (Court of Appeal), Liège. The reference contained two questions. The first of these questions asked whether rules permitting a football club to charge a transfer fee when a player that it contracted to that particular club moves to another club when that contract comes to an end were compatible with the free movement of workers rules in Article 45 TFEU. The second of these questions concerned whether various rules restricting the access of foreign footballers to particular football competitions were contrary to EU law.

⁸⁴¹ Ibid., at 10 and who gives some examples of contexts as being inappropriate for subsidiarity as including the promotion of gender equality pursuant to Article 8 TFEU and environmental protection pursuant to Article 11 TFEU

⁸⁴² For further discussion see K.Alter, 'Who are the Masters of the Treaty? European Governments and the ECJ', <http://aei.pitt.edu/2434/1/002500_1.pdf> last accessed 20.1.14.

⁸⁴³ T.Horsley, 'Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?', (2011) Journal Of Common Market Studies, 1-16 at 11.

⁸⁴⁴ Case C-415/93 *Bosman* [1995] ECR I-4921.

When the reference was considered by the Advocate General and the CJEU they both paid some attention to an argument raised by the German government in relation to UEFA, a regulatory body for football that was supported by reference to the principle of subsidiarity. In particular, they were required to consider what should be the extent of the EU's involvement in the regulation of sporting activities. The Advocate General in considering this argument opined that Article 48 TFEU was appropriate for regulation of sporting activities, the latter being an economic activity.⁸⁴⁵ Furthermore he opined that,

‘Similar considerations apply to the reference by UEFA to the principle of subsidiarity now enshrined in Article 3b of the EC Treaty. The principle of subsidiarity, according to the wording of Article 3b, does not apply in the field of the Community's exclusive competence, such as the fundamental freedoms. Nor can it be deduced from that principle that Community law could not be applied to the field of professional sport’.⁸⁴⁶

This really limits subsidiarity as almost any issue of EU competence can be seen from the angle of freedom of movement.

The CJEU also considered and rejected the argument raised by the German government that regulation of sporting activities by the Union should be limited to what was strictly necessary as required by the principle of subsidiarity.⁸⁴⁷ In particular it ruled that,

‘Subsidiarity, as interpreted by the German Government to the effect that intervention by public authorities, and particular [Union] authorities, in the area in question must be confined to what is strictly necessary, cannot lead to a situation in which the freedom of private associations to adopt sporting rules restricts the exercise of rights conferred on individuals by the Treaty’.⁸⁴⁸

Thus, both the Advocate General and the CJEU in this case have undertaken a light touch subsidiarity review in that they have both paid some attention to

⁸⁴⁵ Ibid., at para 130.

⁸⁴⁶ Ibid., at para 130.

⁸⁴⁷ Case C-415/93 *Bosman* [1995] ECR I-4921 at 72.

⁸⁴⁸ Ibid., at para 81.

subsidiarity in their deliberations on an argument raised by the German government in relation to UEFA, a regulatory body for football.

Horsley has also identified how the more recent case of *Fundacion Gala Dali*⁸⁴⁹ involved a question which required the CJEU to make a decision on the scope of union intervention in the regulation of the internal market as an area of shared competence when it was asked to interpret whether Directive 2001/84 on the resale right for authors was contrary to French legislation on succession.⁸⁵⁰

When considering this question, the Advocate General stressed the importance of a key purpose of the Directive, namely to eliminating distortions to the competitive environment within the internal market, and ensuring that a resale right is levied throughout the Union. However, the Advocate General then distinguished the benefit of a resale right in relation to succession on the grounds that ‘ensuring that the right benefits precisely those entitled under a particular law of succession is not [such a distortion to the competitive environment]’.⁸⁵¹

The CJEU also ruled that the scope of Union action was limited in this context and did not extend to prohibiting French legislation which prevented the benefit of a resale right in relation to succession.⁸⁵² In support of this ruling the CJEU acknowledged that as the Union decided against legislative action in relation to national laws on succession, the matter of determining who was entitled to benefit from rights arising under the Directive was a matter for the Member States.⁸⁵³ Such a ruling, Horsley has argued, sits comfortably with the subsidiarity principle as the CJEU in this case appeared to undertake an assessment of the Union’s reasoning as to the extent of legislative action that was needed in this context based on the views of the EU legislature itself.⁸⁵⁴ However, the EU institutions need to support any assessment when considering if legislative action is needed by considering evidence to support its assessment that there was no legitimate purpose here for Union action rather than deferring to the legislature, without elaborating on subsidiarity: this is deference, without subsidiarity being

⁸⁴⁹ Case C-518/08, *Fundacion Gala-Salvador Dali*, judgment of the Court (Third Chamber of 15 April 2010).

⁸⁵⁰ OJ 2001 L272/32

⁸⁵¹ Case C-518/08, *Fundacion Gala-Salvador Dali*, judgment of the Court (Third Chamber of 15 April 2010 Advocate General’s Opinion Para 65.

⁸⁵² Case C-518/08, *Fundacion Gala-Salvador Dali*, judgment of the Court (Third Chamber of 15 April 2010 at para 33.

⁸⁵³ *Ibid.*, at para 32.

⁸⁵⁴ Horsley Op.Cit. at 7.

articulated which the CJEU will have to review. However, such an approach stands in stark contrast to other CJEU cases where the CJEU has adopted a more creative approach when interpreting cases concerning the internal market and justified such an activist approach in periods when there was legislative inertia as evidenced in its key rulings concerning the removal of national barriers to trade.⁸⁵⁵

In respect of the CJEU undertaking a subsidiarity review, the CJEU did not explicitly refer to subsidiarity at all in its reasoning even though subsidiarity in the Treaty is established in Article 5 TEC, now Article 5 TEU, alongside conferral and proportionality. Consequently, the CJEU needs to take this into account in its interpretation. But, and as Kumm points out, in the context of the internal market that although these requirements all ‘work together as integral parts of a comprehensive conceptual framework....in practice this is an area where the jurisprudence of the Court of Justice is confused and uncertain.’⁸⁵⁶ For although conferral, subsidiarity and proportionality are ‘interlinked and all are focused on issues of competencies, ultimately in the service of safeguarding Member States’ autonomy...., in respect of subsidiarity and proportionality the Court of Justice has not succeeded in establishing a plausible conceptual framework that brings together these two ideas so that justice is done to the complex constitutional commitment of Article 5 TEC.’⁸⁵⁷

Furthermore, even though subsidiarity is a key constitutional concept alongside proportionality in EU law-making for mediating the balance of power between the EU and the Member States in areas of shared competence, it was argued in chapter 2 that subsidiarity is an essentially contested concept using Gallie’s theory of essentially contested concepts.⁸⁵⁸ Such conceptual dissonance, it was argued, favours judicial discretion on how it should be applied.⁸⁵⁹ Consequently, it was

⁸⁵⁵ See Case 8/74 *Procureur du Roi v Dassonville* [1974 ECR 837; See also Case 120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649 and Craig, P., and de Búrca, G., *EU Law: Text, Cases and Materials*. (5th ed., Oxford: Oxford University Press, 2011) 64.

⁸⁵⁶ Kumm Op.Cit 505.

⁸⁵⁷ Kumm Op.Cit 519

⁸⁵⁸ W.B.Gallie, ‘Essentially Contested Concepts’, (1956) *Proceedings of the Aristotelian Society* 167-98.

⁸⁵⁹ For further discussion on literature which highlights out disagreement and dissonance are present in the law more than judicial reasoning sometimes suggests and calls for judicial reasoning to engage more fully with such disagreement and dissonance see for example J.Waldron, *Law and*

concluded that there is a compelling argument for judicial reasoning to engage more fully with how the CJEU should deal with such dissonance and operationalise subsidiarity to help ensure the proper respect for the division of power between the EU and the Member States in areas of shared competence

With this in mind, the next section considers the following research questions on the grounds that considering these questions is pivotal in helping to anchor subsidiarity in EU law-making by the CJEU in shared areas of competence outside of judicial review as to ensure a proper respect for localism on the part of the CJEU. Even where there is no change in case outcomes an explicit explanation of how the CJEU had considered subsidiarity in the CJEU's reasoning would help to improve the quality of the reasoning of the CJEU and consequently enhance the legitimacy of the CJEU's ruling.⁸⁶⁰

The first of these questions is whether competence issues are or should be explicitly addressed in every CJEU judgment in cases concerning areas of shared competence in order to demonstrate the relevance of subsidiarity.

The second of these questions is the extent to which it is possible for the CJEU to adopt a single subsidiarity review which treats proportionality as an aspect of subsidiarity applied to competences to anchor subsidiarity to help ensure the proper respect for the division of power between the EU and the Member States when dealing with shared policy areas. For there is a wide variety of shared policy contexts with some types of policy contexts being on the edge of the EU's competence such as equal treatment in social security context. However, there are also other shared policy contexts which involve other competing fundamental principles of EU law such as gender equality or the rights under the Charter for citizens concerning a right to respect for a private and family life. This thesis will focus on one particular shared policy context – determining the residency rights of EU citizens as a lens to explore how a subsidiarity review could address competence issues. It is hoped that this will shed light on what could be agreed

Disagreement (Oxford University Press, 1999), C.Finkelstein, 'Introduction to the Symposium on conflicts of Rights', (2001) 7(3) *Legal theory* 235-238; J.Waldron, 'Security and Liberty: The Image of balance', (2003) 11(2) *Journal of Political Philosophy* 191-210.

⁸⁶⁰ N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.'

upon at European level by the CJEU and, if it is possible, to identify more fully ex ante criteria for the application of subsidiarity thereby enabling the CJEU to engage more meaningfully with subsidiarity in its judicial reasoning. This consideration forms the main contribution of this chapter while chapter 4 focuses on the case study of citizenship.

5. Is it possible to identify more fully ex ante criteria for the application of subsidiarity thereby enabling the CJEU to engage more meaningfully with subsidiarity in its judicial reasoning outside of judicial review?

In every policy area where the EU shares competence with the Member States this thesis proposes that the CJEU should explicitly consider competences in its reasoning in all cases in order to demonstrate the relevance of subsidiarity and its respect for localism although this might not result in any change in outcome, it would help to demonstrate the legitimacy of the CJEU's ruling.⁸⁶¹ The views of the EU institutions when law-making should be referred to and their reasons for favouring local law-making over centralised action should be explicitly stated. For, and as Kumm has pointed out, the advantages of local law-making over centralised action are three fold and encompass efficiency, democracy and preserving the identities of citizens of the Member States which is easier at a local level than a European level.⁸⁶²

However, there is a considerable diversity of shared policy areas that the CJEU is involved in within its case law. On the one hand, there are cases involving shared policy areas where there is a considerable diversity in legal regimes at national level where the EU is acting on the edge of its competence such as in relation to pregnancy and maternity leave and the exception made in EU law for national leave provisions.⁸⁶³ This latter exception has been critiqued by many academics as entrenching the public private divide and perpetuating stereotypical roles of

⁸⁶¹ N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308.

⁸⁶² Kumm Op.Cit. 581

⁸⁶³ See Council Directive 76/207/EEC of 9 Feb 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions [1976] OJ L39/40. This Directive as now been replaced by Directive 2006/54 of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ 204/23

motherhood.⁸⁶⁴ Article 15 of Directive 2006/54 also lays down various standards for women when they return to work from maternity leave.

In addition the Pregnant Workers Directive,⁸⁶⁵ adopted under Article 118 a TEC,⁸⁶⁶ is an example of an area where the EU is acting on the edge of its competence. Examination of the recitals to the Directive reveals a key focus of this Directive being the encouragement of health and safety of three particular groups of workers. Recital 8 lists these three groups as firstly pregnant workers, secondly workers who have recently given birth and finally workers who are breastfeeding.⁸⁶⁷ However, the Directive does include that there is an entitlement to a continuous period of maternity leave of at least 14 weeks, two of which must be compulsory. As Article 8 of the Pregnant Workers Directive is aimed at women, such provisions regarding leave are for women only.⁸⁶⁸ Such provisions do not, however, provide time off for breastfeeding leave, even though the Pregnant Workers' Directive is directly concerned with a worker who is breastfeeding.⁸⁶⁹

⁸⁶⁴ See further C.McGlynn, *Ideologies of Motherhood in European Community Sex Equality Law*, (2000) 6(1) *European Law Journal*.

⁸⁶⁵ Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding. It was the tenth individual Directive to be adopted under the framework Directive 89/391/EEC on health and safety at work. Pregnant workers, workers who have recently given birth or workers who are breastfeeding are a group who face specific risks in the work place and therefore need specific health and safety protection, as set out in the Directive.

⁸⁶⁶ Article 118 a TEC provided, 'Member States shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers, and shall set as their objective the harmonisation of conditions in this area, while maintaining the improvements made. In order to help achieve the objective laid down in the first paragraph, the Council, acting in accordance with the procedure referred to in Article 189c and after consulting the Economic and Social Committee, shall adopt, by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings. The provisions adopted pursuant to this Article shall not prevent any Member State from maintaining or introducing more stringent measures for the protection of working conditions compatible with this Treaty.'

⁸⁶⁷ See further V.Cromack, 'The EC Pregnancy Directive: Principle or Pragmatism?', [1993] *JSWFL* 26.

⁸⁶⁸ However, the recent proposal to amend the Pregnant Workers Directive does propose a minimum period of leave from 14-18 weeks in Article 8. It also proposes giving women a choice when they can take the leave and they are no longer obliged to take the leave before birth. However again the new proposal remains focused on biological reasons for maternity leave and the biological recovery of the mother.

⁸⁶⁹ Article 2 of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding

On the other hand, there are cases involving fundamental rights of EU law such as gender equality or a right to respect for private and family life under the Charter of Fundamental Rights. This begs the question of whether the CJEU should take different factors into account or give more weight to certain factors when undertaking a subsidiarity and proportionality review in such cases. In other words should a subsidiarity and proportionality review be sector specific.

The main area where the CJEU has undertaken a subsidiarity review is in the context of EU institutional action in the internal market context close to the core of EU competences. Kumm proposes the following stages:-

Firstly, Kumm argues that a subsidiarity and proportionality review involves considering whether there should be a legitimate purpose for Union intervention explicitly stated and evidenced as required by Article 5(2) TEU. The latter article requires that ‘the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by Member States...but rather, by reason of the scale or effects of the proposed action, be better achieved at the Union Level.’⁸⁷⁰ This requirement is related to the scale or effects of the proposed action are difficult, argues Kumm, for the CJEU to quantify in its judgement.⁸⁷¹ However Kumm asks ‘when can Member States not sufficiently achieve the relevant purpose?’⁸⁷² Arguably, a threshold could be identified by the CJEU along the lines of a balance of probability standard. But if the CJEU were to adopt such an approach when decision making, would this need to be informed first by a consideration of socio-economic data? Rasmussen has already argued that the CJEU should have access to socio-economic data on a regular basis making references to the advantages of medical and scientific evidence being adduced in the case of *Nisin* where significant medical and scientific data on the dangers to health of *Nisin* were presented before the CJEU.⁸⁷³ Furthermore, as Rasmussen concluded,

‘Access to comprehensive socio-economic fact has become an increasingly important factor conditioning successful handling of federalism disputes over the location of the boundary between central

⁸⁷⁰ Kumm Op.Cit. at 519.

⁸⁷¹ Kumm Op.Cit. at 520.

⁸⁷² Ibid.

⁸⁷³ H.Rasmussen, *On Law and Policy of the European Court of Justice*, (Martinus Hijhoff Publisher, Dordrecht, 1986) 428 citing Dutch *Nisin* case, Case 53/80 *Officier van Justitie v. Koninklijke Kaasfabriek Eysen B V*, [1981] ECR 409., [1982] 2 CMLR 20.

and local spheres of government. Counsel is well advised in future to produce that sort of fact in a variety of cases. The chances of winning in proceedings before the Court of Justice may greatly be enhanced by such briefing'.⁸⁷⁴

Such types of data could take a wide variety of forms but could include health and safety considerations, financial and/or fiscal implications and cultural diversity of local laws in a particular context.

Secondly, Kumm argues, with reference to the *Tobacco Advertising* and *Working Time* cases, that a subsidiarity and proportionality review involves considering whether that the Union internal market measure decided upon by the EU law-making institutions is the minimum necessary to deal with the problem identified.⁸⁷⁵ The present author agrees with Kumm and argues that in light of the Treaty of Lisbon and the reaffirmation of both in Article 5 (3) TEU that the need to undertake a subsidiarity and proportionality review now carries even more weight. For, in respect of proportionality, this too is concerned with the appropriate means to achieve a need but unlike subsidiarity it is concerned with how competence is exercised rather than the EU legislative institutional process of determining the level for exercise of competence. Together, subsidiarity and proportionality are key concepts that the EU lawmaking institutions are required to comply with when law-making in shared policy areas in order to claim not only democratic legitimacy but also to demonstrate to the Member States that they are complying with a key tenet of the rule of law, the requirement of formal legality.⁸⁷⁶ To evidence the Union institutions compliance with proportionality and enable an assessment of compliance with proportionality by the CJEU, the Union legislature should provide evidence of how it has addressed alternative possibilities in detail.

Thirdly, Kumm argues that a subsidiarity and proportionality review involves considering the extent of the effect of a Union measure on autonomy of the Member State and the practical effect on the legal systems of the Member States

⁸⁷⁴ H.Rasmussen, *On Law and Policy of the European Court of Justice*, (Martinus Hijhoff Publisher, Dordrecht, 1986) 459
<http://books.google.co.uk/books?id=eKIBYCIB0rcC&pg=PA427&source=gb_s_toc_r&cad=4#v=onepage&q&f=false> accessed 10.7.13

⁸⁷⁵ Kumm Op.Cit. 521.

⁸⁷⁶ J.Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?', (2002) 21(2) *Law and Philosophy* 154-5.

and that this should not be out of proportion to the result achieved by the Union measure.⁸⁷⁷ This inevitably requires the CJEU to undertake a balancing test. But as Kumm points out, citing the example of the *Swedish Match case*,⁸⁷⁸ where despite an absolute prohibition on tobacco for oral use included in the EU Directive on the manufacture, presentation and sale of tobacco products being found to be proportionate, the CJEU failed to undertake a balancing test.⁸⁷⁹ As he writes,

‘even though Article 5 (3) specifically mentions the principle of proportionality in the context of the conferral of powers and the commitment to subsidiarity, the Court of Justice did not engage proportionality as part of the jurisdictional enquiry...it did not connect that analysis to the legitimate purpose of federal intervention.’⁸⁸⁰

However, the present author suggests that following the Treaty of Lisbon, in every case concerning shared competence the CJEU, and in order to identify limits to the competences through subsidiarity analysis, it should consider is the EU acting on the edge of its competence in shared area of competence or are there genuinely European standards here and that ‘national rules [are] within the field of application of EU law’.⁸⁸¹ This would mean, for example, carefully outlining how one category of competence relates to each other and not overusing Articles 114 and 352 TFEU. Even where there is no change in case outcomes an explicit explanation of how the CJEU had considered subsidiarity in the CJEU’s reasoning would help to improve the quality of the reasoning of the CJEU and consequently enhance the legitimacy of the CJEU’s ruling.⁸⁸²

Secondly, to consider if any Charter rights have been breached in situations falling within EU law.

⁸⁷⁷ Kumm Op.Cit. at 522.

⁸⁷⁸ Case C-210/03, *Swedish Match AB and Swedish Match UK Ltd. v. Secretary of State for Health*.

⁸⁷⁹ Kumm Op.Cit. at 522

⁸⁸⁰ Kumm Op.Cit. at 523.

⁸⁸¹ S.Prechal, ‘Competence creep and General Principles of law, (2010) (3) Review of European Administrative Law at 9.

⁸⁸² N.Everling, ‘The ECJ as a Decision Making Authority’ (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.’

Thirdly, that each shared policy area requires different criteria to be taken into account by the CJEU when undertaking any review in order to take account of the different policy contexts and whether there are any competing interests relevant to a particular policy sector that require balancing. By adopting such an approach is that this should better legitimise genuinely European standards that have a clear legal basis

In respect of what the CJEU should include in respect of quantifying the scale or effects of the proposed action in areas of shared competence are not only to consider the explicit reasons for Union action but also to review the procedural steps of the Commission. So, for example, the CJEU could review whether the Commission has undertaken a rigorous subsidiarity and proportionality review in keeping with the Impact Assessment guidelines of 2009'.⁸⁸³ In particular the Impact Assessment guidelines require the following questions to have been considered and 'substantiated with qualitative and where possible quantitative indicators'.⁸⁸⁴

'1.Does the issue being addressed have transnational aspects which cannot be dealt with satisfactorily by action by Member States? (e.g. reduction of CO 2 emissions in the atmosphere)'.

In respect of this provision, the CJEU would need to examine if there was data to illustrate that Member State action was insufficient to deal with any transnational aspects.

'2.Would actions by Member States alone, or the lack of Community action, conflict with the requirements of the Treaty? (e.g. discriminatory treatment of a stakeholder group)

3. Would actions by Member States alone, or the lack of community action, significantly damage the interests of Member States? (e.g. action restricting the free circulation of goods).

4. Would action at Community level produce clear benefits compared with action at the level of Member States by reason of its scale?

⁸⁸³ SEC (2009) 92.

⁸⁸⁴ SEC (2009) 92 at 23.

5. Would action at Community level produce clear benefits compared with action at the level of Member States by reason of its effectiveness?⁸⁸⁵

Finally, the Impact Assessment Guidelines acknowledge that as the answers may not be the same for each policy option that these questions should be posed for each policy option⁸⁸⁶ and that any Union action meets the conditions set by the principle of proportionality: ‘the principle of proportionality states that any Union action should not go beyond what is necessary to achieve satisfactorily the objectives which have been set’.⁸⁸⁷ It then gives a set of questions that should be asked to ensure that the proportionality principle has been applied correctly.

‘Scope of instrument

1. Does the option go beyond what is necessary to achieve the objective satisfactorily?
2. Is the scope of action limited to those aspects that Member States cannot achieve satisfactorily on their own and where the Union can do better? (Boundary test).
3. If the initiative creates a financial or administrative cost for the Union, national governments, regional or local authorities, economic operators or citizens, is this cost minimised and commensurate with the objective to be achieved?
4. Will the community action leave as much scope for national decision as possible while achieving satisfactorily the objectives set?
5. While respecting Community law, are well-established national arrangements and special circumstances applying in individual Member States respected?

Nature of Instrument

6. Is the form of community action (choice of instrument) as simple as possible, and coherent with satisfactory achievement of the objective and effective enforcement?

⁸⁸⁵ Ibid.

⁸⁸⁶ Ibid.

⁸⁸⁷ Ibid., at 29.

7. Is there a solid justification for the choice of instrument – regulation, (framework) directive, or alternative regulatory methods such as co-regulation or self-regulation?’⁸⁸⁸

Consequently, any subsidiarity and proportionality review by the CJEU in the context of the internal market should ensure that not only have these questions have been considered by the EU institutions but that such consideration is supported by qualitative and where possible quantitative indicators.

An illustration of how such a subsidiarity and proportionality review could be useful is to apply the proposed subsidiarity and proportionality review in the context of the *Bosman case*.⁸⁸⁹ This case was considered earlier in section 4 of this chapter and involved considering whether Article 48 TFEU applied to rules laid down by national sporting associations, sport being on the edge of EU competence. It was also an example of where the CJEU in that case did consider in para 81 whether ‘national rules [are] within the field of application of EU law’. In particular, it ruled that article 48 applied not only ‘to the action of public authorities but extends also to rules of any other nature aimed at regulating gainful employment in a collective manner’. Furthermore the CJEU considered in para 84 that, ‘if the scope of Article 48 of the Treaty were confined to acts of a public authority there would be a risk of creating inequality in its application.... That risk is all the more obvious in a case such as that in the main proceedings in this case in that.... the transfer rules have been laid down by different bodies or in different ways in each Member State’. However, although this does demonstrate the CJEU paying some attention to the scope and ambit of Article 48 TFEU, it is proposed, using this case as an example, that the CJEU needs to more meaningfully engage with subsidiarity and proportionality in its judicial reasoning. In the context of the *Bosman case*, it is proposed firstly that this could include the CJEU identifying limits to the competences through subsidiarity analysis by making explicit reference in its reasoning to the fact that sport is on the edge of EU competence to demonstrate respect for subsidiarity. Secondly, it is proposed that this would involve the CJEU considering if there were genuinely European standards here and being explicit in its reasoning about when it is acting on the edge of its competence in an area of shared area of competence. Finally, it is proposed that

⁸⁸⁸ SEC (2009) 92 at 30.

⁸⁸⁹ Case C-415/93 *Bosman* [1995] ECR I-4921.

this would involve the CJEU stating whether any relevant qualitative or quantitative evidence in relation to the effect on the internal market of rules laid down by sporting associations had been considered and, if so, how it had been assessed and weighed up against relevant qualitative or quantitative evidence concerning the effect of Article 48 TFEU on rules laid down by sporting associations.

Furthermore, the CJEU could also liaise with the national referring court or a national research body to ascertain the national views as to whether there are any local circumstances requiring additional consideration.⁸⁹⁰ Adopting this approach would help inform the CJEU in reviewing the institutions decision regarding the extent to which the need for Union action outweighs the respect for local law making inherent in subsidiarity.

For national courts, the advantages of the CJEU explicitly respecting subsidiarity in the CJEU's reasoning in judicial review cases would be twofold: firstly, it would improve the quality of judicial reasoning by providing justification for its ruling and secondly it would enhance the legitimacy of the CJEU's decision.⁸⁹¹ Furthermore, for EU citizens, the CJEU explicitly stating the criteria used by the CJEU when balancing subsidiarity against other competing principles is more easily understood by the lay EU citizen than more complex methods of judicial reasoning. Such an approach would also help to reassure national courts as well as EU citizens that the CJEU is respecting subsidiarity and respect for local law-making when undertaking a subsidiarity review.⁸⁹² Even where there is no change in case outcomes an explicit explanation of how the CJEU had considered subsidiarity in the CJEU's reasoning would help to improve the quality of the

⁸⁹⁰ A similar idea has been mooted in the context of the European Court of Human Rights where there has been discussion of creating a Research Division within the ECHR's Registry by S.Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (2006) 189. See also G.Rutherglen, 'Title VII Actions', (1980) 47 U Ch LR at 713 for how elaborate statistical evidence has been vital in the development of disparate impact cases in America when considering justifications put forward by Member States for their state social security rules.

⁸⁹¹ N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308.

⁸⁹² See further Bogdandy, 'Founding Principles of EU law: A Theoretical and Doctrinal Sketch', (2010) 16 (2) *European Law Journal* at 103 who argues more generally that 'to devise legal controversies as conflicts of principles allows for a politicisation which should be welcomed in light of the principle of democracy, since it promotes the public discourse on judicial decisions'.

reasoning of the CJEU and consequently enhance the legitimacy of the CJEU's ruling.⁸⁹³

With this in mind, subsequent chapters will focus on considering whether the CJEU has undertaken a subsidiarity and proportionality review in cases involving the determination of residency rights of EU citizens and the criteria involved in balancing conflicting issues in the particular sector and if not, how the CJEU could undertake a subsidiarity and proportionality review.

Such research also feeds into wider discussions about the judicial approach to fundamental rights post Lisbon⁸⁹⁴ and the difficulties of balancing the differing interests in this context. This is especially important in the new human rights era and following the accession of the EU to the European Convention on Human Rights where the EU 'will have its legal system measured by human rights standards'⁸⁹⁵ and the CJEU does not want to be found to be lacking in respect of the quality of its reasoning.⁸⁹⁶ Thus the CJEU needs to consider what the minimum standards have been established under the European Convention on Human Rights on this and to include in its reasoning why it is not enough just to rely on these. Here subsidiarity can be related to the divide between international law and EU law: the CJEU needs to explain why it is not leaving human rights to the ECHR.⁸⁹⁷ Here the CJEU could draw upon an argument by Schütze that there has been a conceptual shift of emphasis in EU federal philosophy from a dual federalism to co-operative federalism and that the latter encompasses the idea that the EU and Member States work together in a shared legal sphere.⁸⁹⁸ Thus when

⁸⁹³ N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.'

⁸⁹⁴ See S. Morano-Foadi and S.Andreadakis, 'Reflections on the Architecture of the EU after the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights', (2011) pp 595-610 at 595 and who argues that the post-Lisbon era is characterized by firstly the impact of the Charter of Fundamental Rights following Article 6(1) of the TEU and secondly the future accession to the ECHR of the EU pursuant to Article 6(2) TEU.

⁸⁹⁵ T. Lock, 'EU Accession to the ECHR: implications for the judicial review in Strasbourg', (2010) *European Law Review* at 16 See also S. Douglas-Scott, 'EU Admission to the ECHR' 19 *Maastricht Journal of European and Comparative Law* (2012)]

⁸⁹⁶ T. Lock, 'EU Accession to the ECHR: implications for the judicial review in Strasbourg', (2010) *European Law Review* at 16.

⁸⁹⁷ See further R.Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law*, (2009, OUP)

⁸⁹⁸ *Ibid.*, for a consideration of the federal philosophy that informs the EU's legal structure and in particular an argument of how the EU legal system has evolved from dual federalism (which encompasses the philosophical idea of dual sovereignty where both governmental bodies are co-

the EU accedes to the ECHR it has a duty in conjunction with the Member States to ensure compliance in the shared legal sphere with ECHR standards rather than simply leaving the matter to the ECHR court.

6. Conclusion

The purpose of this chapter was to consider whether subsidiarity and proportionality, as twin constitutional principles in EU law-making, bind the CJEU as law-maker in its interpretation of cases in shared competence areas and, if so, what can be agreed at European level?

Section 2 considered the Court of Justice of the European Union (the CJEU) as a unique supranational law-making institution. It was also highlighted how in academic literature the CJEU has been subject to considerable criticism on the grounds that the CJEU has frequently in its interpretation in a variety of policy contexts has gone beyond the meaning of the wording of the texts of the Treaties agreed by the Member States.⁸⁹⁹ Secondly, with reference to a selection of case law with reference to relevant academic literature, it was noted that the courts pro-union interpretative tendency and the emphasis of the CJEU in its case law on effect utile and ensuring the uniformity of EU law is used to smother subsidiarity with integration logic.

In light of the recent affirmation of subsidiarity following the Treaty of Lisbon, the chapter then revisited and agreed with literature firstly by Kumm as to how he treats proportionality as an aspect to subsidiarity applied to competences. Secondly, literature by De Búrca et al that has convincingly argued that the CJEU as a law-making institution should be bound by subsidiarity outside of judicial review cases when interpreting in areas of shared competence. Further subsidiarity is an essentially contested concept; such conceptual dissonance favours judicial discretion on how it should be applied and consequently raises the question of how such discretion should be justified within the reasoning of the

equals) to co-operative federalism (which encompasses the philosophical idea that two governmental bodies work together in a shared legal sphere).

⁸⁹⁹ See for example P.Neill, *The European Court of Justice: A Case Study in Judicial Activism* (London: European Policy Forum, 1995); T.Hartley, 'The European Court, Judicial Objectivity and the Constitution of the European Union', (1996) 112 *Law Quarterly Review* 95-109 at 95.

CJEU. It was then contended that as a minimum that the CJEU should explicitly address competence issues in its reasoning in every case concerning an area of shared competence. For this could help to counter claims that the CJEU displays an unjustified emphasis in its case law on the need to pursue an ‘ever closer Union’ which deprives Member States of their competencies and is at the expense of the legal systems of the Member States.⁹⁰⁰ It would also be consistent with subsidiarity and its inherent respect for localism in conjunction with the national identity clause in Article 4 (2) TEU.

The contribution of this chapter is to set out what could be agreed upon at European level by proposing that not only should the CJEU should move beyond an abstract discussion of subsidiarity and proportionality but that it should explicitly address any shared competence issues in its reasoning as well as setting out specific guidance about what the factors or criteria has informed its reasoning where it has undertaken any balancing of any competing issues in its judgement. Even where there is no change in case outcomes an explicit explanation of how the CJEU had considered subsidiarity in the CJEU’s reasoning would help to improve the quality of the reasoning of the CJEU and consequently enhance the legitimacy of the CJEU’s ruling.⁹⁰¹

The key issues to consider here are firstly the general criteria for applying a subsidiarity and proportionality review applied to competences. Secondly, in considering the question of whether the criteria involved in a balancing test by the CJEU should be sector specific, it has proposed that each shared policy area requires different criteria to be taken into account by the CJEU when undertaking any review in order to take account of the different policy contexts and whether there are any competing interest relevant to a particular policy sector that require balancing. In developing the criteria for subsidiarity the approach is to try and specify it and make it rule-bound as much as possible, as this would relate it back

⁹⁰⁰ Ibid.

⁹⁰¹ N.Everling, ‘The ECJ as a Decision Making Authority’ (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.’

to the rules-principles distinction.⁹⁰² This relates to the rule of law, principles of certainty and predictability⁹⁰³ and, by adopting such an approach, this should better legitimize genuinely European standards that have a clear legal basis. Subsidiarity, as it stands, is presented as more of an incommensurable principle by its critics,⁹⁰⁴ and thus not so suited to adjudication.⁹⁰⁵ A subsequent chapter 4 will then focus on one particular shared policy context – determining the rights of EU citizens in chapter 4- as a lens to explore how a subsidiarity and proportionality review could address competence issues. Chapter 5 then forms a case study to illustrate this theoretical framework more fully. This feeds into wider discussions about the judicial approach to fundamental rights post Lisbon⁹⁰⁶ and the difficulties of balancing subsidiarity and a respect for localism with other conflicting principles of EU law. This is especially important in the new human rights era and following the accession of the EU to the European Convention on Human Rights where the EU ‘will have its legal system measured by human rights standards’⁹⁰⁷ and the CJEU does not want to be found to be lacking in respect of the quality of its reasoning.⁹⁰⁸

⁹⁰² For further discussion on the difference between legal rules and principles see R.Dworkin, ‘The Model of Rules I’, in: *idem, Taking Rights Seriously* (Harvard University Press Cambridge 1987) 14 at 25-26.

⁹⁰³ B.Tamanaha, *On the Rule of Law: History, Politics, Theory*, (Cambridge: Cambridge University Press, 2004)

⁹⁰⁴ See for example K. Möller, ‘Proportionality: Challenging the critics’, (2012) 10 (3) *International Journal of Constitutional Law* 709-731 at 730; P.G.Carrozza, ‘Subsidiarity as a structural principle of international human rights law’, (2003) 97 *The American Journal of International Law*, 38 at 78.

⁹⁰⁵ See chapter 2 for further discussion of the contested nature of subsidiarity in the literature.

⁹⁰⁶ See S. Morano-Foadi and S.Andreadakis, ‘Reflections on the Architecture of the EU after the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights’, (2011) pp 595-610 at 595 and who argues that the post-Lisbon era is characterized by firstly the impact of the Charter of Fundamental Rights following Article 6(1) of the TEU and secondly the future accession to the ECHR of the EU pursuant to Article 6(2) TEU. For the text of the amended Charter and its revised Explanations see [2007] OJ C303/1 and C/303/17.

⁹⁰⁷ T. Lock, ‘EU Accession to the ECHR: implications for the judicial review in Strasbourg’, (2010) *European Law Review* at 16.

⁹⁰⁸ T. Lock, ‘EU Accession to the ECHR: implications for the judicial review in Strasbourg’, (2010) *European Law Review* at 16.

Chapter 4

The fundamental status of EU citizenship and the determination of residency rights of EU citizens by the CJEU

1.Introduction

2.Theoretical Perspectives: the concept of citizenship and its link to political identity which in an EU context means that the competence must be necessarily shared with the Member States

2.1 Introduction

2.2 The concept of citizenship and its link to political identity which in an EU context means that the competence must be necessarily shared with the Member States

2.3 The limits of EU citizenship

2.4 The problems of differing levels of protection from expulsion for different categories of EU citizens

2.5 Conclusion

3. Legal Perspectives – EU citizenship, the CJEU and the fundamental status of EU citizenship and residency rights in Directive 2004/38

3.1Introduction

3.2 The Introduction of EU citizenship provisions following the Treaty of Maastricht

3.3 The strengthening of residency rights for EU citizens in Directive 2004/38

3.4 3.4 The CJEU, the fundamental status of EU citizenship and residency rights of EU citizens

3.5 The reaffirming and strengthening of the residence rights of EU citizens by the Treaty of Lisbon in light of the Charter of Fundamental Rights

4. The failure of the CJEU to undertake a subsidiarity and a proportionality review by the CJEU when determining the residency rights of EU citizens following the Treaty of Lisbon

5. Conclusion

1. Introduction

Agreeing with de Búrca⁹⁰⁹ and Kumm⁹¹⁰, it was argued in chapter 3 that following the Treaty of Lisbon, firstly that there is even more weight to the argument that the CJEU is required firstly to demonstrate the proper respect for local law-making in areas of shared competence in its reasoning. Secondly, that the CJEU should demonstrate what could be agreed upon at European level in terms of protecting the fundamental status of EU citizenship in light of the Charter of Fundamental Rights and the impending accession of the EU to the ECHR⁹¹¹ when dealing with cases involving the residency rights of EU citizens. As de Búrca has pointed out, 'the act of interpretation'⁹¹² itself can constitute the exercise of law-making power by the Court'.⁹¹³ The current author agrees with an argument by de Búrca that the CJEU is a law-making institution and therefore bound by subsidiarity in its interpretation of shared competence areas. Furthermore, the

⁹⁰⁹ G.De Búrca, 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor' (1998) 36(2) *Journal of Common Market Studies*, 217-235.

⁹¹⁰ M.Kumm, 'Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union', (2006) 12(4) *European Law Journal* 503-533 at 505.

⁹¹¹ Council of Europe, Accession of the EU to the European Convention on Human Rights, <http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/default_en.asp> accessed 14.1.14.

⁹¹² See J.Bengoetxea, *The Legal Reasoning of the European Court of Justice*, (1993) for further discussion of the method of reasoning that the CJEU employs. See in particular his discussion at 114 that the method of interpretation that the CJEU adopts when deciding cases is an important question as 'the CJEU does not enjoy primary authority to create law because the Court must satisfy its audience that in their decisions they are applying valid law'. See also A. Bredimas, *Methods of Interpretation and Community Law* (North Holland, 1978) and Koopmans, T, 'The Theory of Interpretation and the Court of Justice', in O'Keeffe and Bavasso (eds) *Judicial Review in EU law* (Kluwer, 2000) and G.Conway, 'The Limits of Legal Reasoning and the European Court of Justice', (CUP, 2012) chapter 2.

⁹¹³ G.de Búrca, 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor', (1998) 36 (2) *Journal of Common Market Studies* 217-35 at 222.

current author will point out in this chapter that to date the CJEU has paid little attention to subsidiarity applied to competences and a respect for localism in citizenship cases concerning the rights of EU citizens who are economically inactive.⁹¹⁴ On the other hand, in judicial review cases in shared competences areas discussed in chapter 3 the CJEU was prepared to adopt at least a very low intensity judicial review of subsidiarity and proportionality applied to competences in the cases selected in that context.

With this in mind, and building upon an argument by Kumm that the CJEU should employ subsidiarity and proportionality as an aspect of subsidiarity applied to competences⁹¹⁵, this chapter explains how the CJEU should review subsidiarity and proportionality applied to competences in this particular context. An explicit explanation of how the CJEU had considered subsidiarity in the CJEU's reasoning would help to improve the quality of the reasoning of the CJEU and consequently enhance the legitimacy of the CJEU's ruling.⁹¹⁶ This is an important issue. On the one hand, EU citizenship has been proclaimed as having fundamental status in EU law⁹¹⁷ even though the approach of the CJEU in citizenship cases involving social protection for EU migrant citizens has been incremental and piecemeal leading to what O'Brien has termed 'a perforated personhood patchwork'⁹¹⁸ where 'gaps in this patchwork can tip non-nationals into destitution, suggesting a fairly loose commitment to social protection and social justice for non-nationals'.⁹¹⁹ On the other hand, EU citizenship, following the Treaty of Lisbon⁹²⁰, remains parasitic on national citizenship in that in order to be an EU citizen you must first be a national of a Member State. Citizenship, therefore, is complementary, but on the approach of the CJEU it impacts on competence generally. Furthermore, EU citizenship is constrained by the limits of EU competence in areas of shared competence and

⁹¹⁴ See for example Case C-85/96, *Martinez Sala v Freistaat Bayern*, [1998] ECR I-2691

⁹¹⁵ See M.Kumm, (2006) 'Constitutionalising subsidiarity in Integrated Markets: the Case of Tobacco Regulation in the European Union' (12(4) ELJ 503-533 at 531

⁹¹⁶ N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.'

⁹¹⁷ Case C-184/99, *Grzelczyk v Centre Public D'Aide Sociale D'Ottignies-Louvain-La-Neuve* [2012] 1 CMLR 19.

⁹¹⁸ C. O'Brien, 'I Trade, therefore I am: Legal Personhood in the European Union', (2013) 50 *Common Market Law Review* 1643-1684 at 1649.

⁹¹⁹ *Ibid.*

⁹²⁰ OJ C 306, 17.12.2007, p. 1-271.

subsidiarity.⁹²¹ Respect for the latter principle, which has an inherent respect for local law-making, taken in conjunction with the national identity clause, should be a powerful constraint on the CJEU when interpreting in this area. The CJEU should also ensure that when weighing up criteria when determining the residency rights of EU citizens it also takes into account any limitations which may legitimately be imposed on any Charter rights.

In light of the wide range of policy contexts for which citizenship rights could be an issue, it is further submitted that an important issue the CJEU needs to address in all such cases is when are the substance of rights compromised such that it does not need to consider any actual cross-border element.⁹²² This would involve firstly a consideration of whether it is possible to identify whether there is a minimum core of EU rights that are so sacrosanct that there is no need to consider any actual cross border element. This will be considered further in section 4 and chapter 5.

Secondly, in respect of considering the national measure at issue, use could be made of a test suggested by Alexy⁹²³ who proposed that a graduated scale for national measures which contained three levels – serious, moderate and minor – could be applied when considering national measures⁹²⁴ Alexy's test does not exhaust the problem of making value judgements about relative degrees of importance of different interests, but it provides a basis for a more explicit articulation, something that the CJEU tends to be quite poor at.

Thirdly, to consider how the CJEU approaches balancing the tension between a citizen's rights in a particular policy context and any legitimate objectives of the Member States as well as the general interest of the internal market, and how such questions could include asking whether there is a legitimate aim for a particular national measure and, if so, whether the particular national measure was both a necessary and proportionate way to implement that legitimate aim. The CJEU

⁹²¹ See also recent literature by S.Sánchez, 'Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising alliance or a Dangerous Liaison?', (2014) 20 (4) European Law Journal 464-481 at 466 and who points out that 'the development of citizenship of the Union has progressively brought about a growing tension between the limited protection of individual's rights outside the realm of the fundamental freedoms and the egalitarian connotations attached to the concept of citizenship'.

⁹²² C-34/09 *Gerardo Ruiz Zambrano v Office National de L'Emploi (ONEM)*, [2011] ECR I-1177.

⁹²³ R.Alexy, *A Theory of constitutional Rights*, translated by J.Rivers, (OUP, 2002) 401-414.

⁹²⁴ Ibid.

needs to systematically set out the scope of shared competences and apply rights within them when the EU has exercised competence legislatively, rather than using rights as a vehicle for expanding EU competences, which it has tended to do by dropping the cross-border element.⁹²⁵ Further, the CJEU needs to relate its own attempts at rights protection to both the European Convention on Human Rights and national constitutional traditions.

Finally, it would also be important for the CJEU not only to demand good and valid reasons to justify considerable interference with a particular right when weighing this against a particular national legitimate aim but also to list the factors that it has taken into consideration when undertaking such a balancing exercise⁹²⁶ in order to anchor subsidiarity and proportionality applied to competences and help ensure the proper respect for the division of power between the EU and the Member States. This would be especially important in areas where the EU is acting on the edge of its competence such as in relation to social security or immigration. Here the need for the CJEU to include a subsidiarity and proportionality review and be explicit in its reasoning of how it had considered subsidiarity, weighed up the seriousness of the national measure at issue against the need to balance the interests of society with those of individuals and groups as well as demonstrating a respect for localism by giving more weight to the Member State's right to regulate is the most compelling.

If such an approach were adopted this would help to counter claims that the CJEU has an unjustified emphasis on an ever closer Union and ignores the Member States local law on sensitive immigration or entitlement to welfare issues. Furthermore, it is proposed that the criteria involved in any balancing test undertaken by the CJEU in this context should be sector specific and that the CJEU should be explicit in its reasoning as to what criteria it had utilised when weighing up competing criteria during any subsidiarity and proportionality

⁹²⁵ See for example C-34/09 *Gerardo Ruiz Zambrano v Office National de L'Emploi (ONEM)*, [2011] ECR I-1177 discussed further in chapter 5.

⁹²⁶ See the recent case of *Huang v Secretary of State for the Home Department Kashmiri v Secretary of State for the Home Department*, [2007] UKHL 11 at para 19-20 where the House of Lords controversially said that the national courts should be doing the balancing here. See also the discussion J.Rivers, 'Proportionality and variable intensity of review', (2006) Cambridge Law Journal 175-6 by that 'there is considerable agreement as to why judges should have regard for the views of legislatures and executive bodies when testing for proportionality. The Human Rights Act 1998 makes the protection of Convention rights a joint responsibility of Parliament and the courts....the doctrine of proportionality needs structuring in such a way that, although applied by the judiciary, it is sensitive to the proper contribution of the other branches of government.'

review. Greater judicial candour about the extent and content of judicial discretion is necessary in order to adhere to the rule of law ideal of the law having a public and objective content.⁹²⁷ The need for the CJEU to include its consideration of these matters in its reasoning is also vital in demonstrating that it is upholding the rule of law,⁹²⁸ the latter being enshrined in Article 2 TEU. The rule of law is also a widely recognised aspirational principle as evidenced in both the European Convention of Human Rights⁹²⁹ and the preamble to the Statute of the Council of Europe.⁹³⁰ Thus where the CJEU departs from the rule of law through judicial activism this inevitably leads to a ‘predictable loss of judicial authority and legitimacy’⁹³¹

On the other hand, in a more recent development is the giving of legal effect to a Bill of Rights for EU citizens in the Charter of Fundamental Rights pursuant to the Treaty of Lisbon.⁹³² The giving of legal effect to the Charter in EU law, more generally, has been regarded by Raucea as,

‘a considered a major step forward in the promotion of fundamental rights within EU law, indeed a milestone also in the delicate architecture of European citizenship. Because of the Lisbon Treaty, the Charter of Fundamental Rights of the European Union has been granted with the same binding legal force as the Treaties, becoming a more visible catalogue of parameters that should be considered in testing the legal validity of the Union's legislative acts and policy actions.’⁹³³

So post the Treaty of Lisbon when the CJEU scrutinises aspects of Member State regulatory regimes which also concern fundamental rights is there a particular need for it to act as an arbiter between respect for Member States law and protecting the residence rights of EU citizens with reference to the Charter of Fundamental Rights? The sensitivity of the defining rights sharpens the subsidiarity concern. This is to examine the competence of the CJEU and its

⁹²⁷ For further discussion see B.Tamanaha, *On the Rule of Law: History, Politics, Theory*, (Cambridge University Press, 2004)

⁹²⁸ For further discussion see B.Tamanaha, *On the Rule of Law: History, Politics, Theory*, (Cambridge University Press, 2004).

⁹²⁹ European Treaty Series No 5.

⁹³⁰ European Treaty Series No 1

⁹³¹ See B.Tamanaha, *On the Rule of Law: History, Politics, Theory*, (Cambridge University Press, 2004) at 9.

⁹³² OJ C 306, 17.12.2007, p. 1–271.

⁹³³ C. Raucea, ‘Fundamental Rights: The Missing Pieces of European Citizenship?’, [2014] 14 (10) German Law Journal 2021-2040 at 2026.

institutional placing at a supranational level as suited to adjudication of citizenship. This is discussed further in section 4 and chapter 5.

Adopting a doctrinal perspective, this chapter explores in light of the Treaty of Lisbon how a subsidiarity and proportionality review applied to competences could be anchored by the CJEU when determining the residency rights of EU citizens.⁹³⁴ An explicit explanation of how the CJEU had considered subsidiarity in the CJEU's reasoning would help to improve the quality of the reasoning of the CJEU and consequently enhance the legitimacy of the CJEU's ruling.⁹³⁵

This is an important question in light of the impending accession of the EU to the ECHR and also feeds into wider discussions about the judicial approach to fundamental rights post Lisbon⁹³⁶ and the difficulties of balancing subsidiarity and a respect for localism with other conflicting principles of EU law. As Konstadinides and O'Meara point out,

‘The value of accession in reinforcing the centrality of fundamental rights protection in the EU legal order, and on a practical level, subjecting the EU to external scrutiny should not be underestimated. The relationships between the European Court of Human Rights and the CJEU may be tested, and emerging case law closely scrutinised in cases involving overlap between core Charter and Convention rights, with draft legislation coming under renewed scrutiny for compatibility with the Charter and the ECHR. Commissioner Reding's statement that EU accession will increase the perception of the European Court of Human Rights as the European capital of fundamental rights protection does not diminish the duties of all courts to robustly adjudicate in defence of fundamental rights protection.’⁹³⁷

⁹³⁴ See section 2 for further discussion.

⁹³⁵ N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.'

⁹³⁶ See S. Morano-Foadi and S.Andreadakis, 'Reflections on the Architecture of the EU after the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights', (2011) pp 595-610 at 595 and who argues that the post-Lisbon era is characterized by firstly the impact of the Charter of Fundamental Rights following Article 6(1) of the TEU and secondly the future accession to the ECHR of the EU pursuant to Article 6(2) TEU.

⁹³⁷ T.Konstadinides and N.O'Meara, 'Fundamental Rights and Judicial Protection' in D.Arcarazo and C.Murphy, *EU Security and Justice Law after Lisbon and Stockholm*, (Hart Publishing, 2014) 83.

A subsequent chapter will adopt a normative approach and make a consideration of the specific criteria that should be identified when considering the right of residence cases for non-economically active citizens where there is no cross border element. Such cases are particularly important because the absence of a cross-border element is at the limits of EU competence. Particular reference is made to the *Zambrano* case.⁹³⁸ 2 other cases of *Rottman*,⁹³⁹ and *Dereci*⁹⁴⁰ will also be considered. These 3 cases have been selected as they are excellent examples of cases where the CJEU has to adjudicate in areas involving fundamental rights where both the EU and the Member State share competence. The cases also involve shared policy areas involving contentious issues for the EU, the CJEU and the Member States. Firstly, as EU law in this context is an area of shared competence between the EU and the Member States this leads to difficult questions for the CJEU as to where the balance is to be drawn in cases on matters which touch upon Member States' preserve of national immigration and the EU citizenship provision in light of the Charter of Fundamental Rights. Secondly, the question of residence rights of non-economically active EU citizens' raises difficult issues relating to the disadvantages of migration and in particular the cost of a Member State supporting EU migrants who may have no means of support and could be a burden on the Member States welfare system.⁹⁴¹ Thirdly, there are implications for the fundamental status of EU citizenship of having extra residency protection for those EU migrant citizens who have resided in a particular host Member State for a certain period of time, protected from expulsion in Directive 2004/38.⁹⁴²

⁹³⁸ C-34/09 *Gerardo Ruiz Zambrano v Office National de L'Emploi (ONEM)*, [2011] ECR I-1177.

⁹³⁹ Case C-135/08, [2010] ECR I-1449 *Rottmann*.

⁹⁴⁰ Case C-256/11, *Dereci and others v Bundesministerium für Inneres*, [2011] ECR I-0000.

⁹⁴¹ For example, in the UK, there has been heated debate about not only the benefits but also the disadvantages of migration especially following 1 January when Romanian and Bulgarian nationals are able to look for work in other EU Member States. For further discussion see for example Business for New Europe, *Migration – Making it work*, (2013) <http://www.bnegroup.org/images/uploads/publications/files/LATEST- BNE_Paper - Migration Making it Work - May 2013.pdf> accessed 16.5.14.

⁹⁴² Although beyond the scope of the discussion in this thesis, the position of third country nationals who are long term residents is governed by Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ 2004 L 16/44 as amended by Directive 2001/51, OJ 2011 L 123/1. The Directive does not apply to the UK, Ireland or Denmark. For further discussion of this Directive see most recently D.Arcarazo, 'Civic Citizenship Reintroduced? The Long-Term Residence Directive as a Post-National Form of Membership', 21(2) (2015) *European Law Journal* 200-219.

Fourthly in light of Article 45 (3) TFEU which already permits Member States to expel EU migrant citizens who pose a sufficiently serious threat to the fundamental interests of society,⁹⁴³ there are also difficult questions as to the intensity of any proportionality review in EU residency cases where EU migrant citizens are unable to support themselves. Such difficult questions involve not only the level of deference that the CJEU should articulate in its reasoning but also what role the Charter of Fundamental Rights should play in both contexts and the possible overlapping role of the ECHR especially as ‘any ECHR decisions will be binding on the Union as a matter of international law’⁹⁴⁴ i.e. following the EU accession to the ECHR. Furthermore, the EU can only have responsibility for its actions on the basis of a valid competence to carry them out, under the rules of attribution of responsibility in international law, which the European Court of Human Rights applies.⁹⁴⁵ Thus the EU, as a supranational body, is not responsible for the measures advanced by Member States in their implementation of EU law i.e. the EU as a supranational body does not have sufficient control over the Member State actions. However, as Eckes points out, there could be challenges to the Court’s autonomy to interpret EU law in that the,

‘The European Court of Human Rights (ECtHR) might attribute responsibility to and apportion it between the EU and its Member States’ which is particularly problematic here in light of ‘the complex and dynamic task division between the EU and its Member States [which] could lead the ECtHR to offer an interpretation of substantive EU law binding on the Court of Justice’.⁹⁴⁶

⁹⁴³ Case 30/77, *Bouchereau*, [1977] ECR 1999.

⁹⁴⁴ C. Eckes, ‘One Step Closer: EU Accession to the ECHR ‘ Const. L. Blog (2nd May 2013) (available at <http://ukconstitutionallaw.org>).

⁹⁴⁵ International Law Commission, *Draft articles on the law of Treaties between States and International Organisations or between international organisations with commentaries*, (1982). For <http://legal.un.org/ilc/texts/instruments/english/commentaries/1_2_1982.pdf> last accessed 29.1.14. See also the cases of *Loizidou v Turkey*, 40/1993/435/514, Council of Europe: European Court of Human Rights, 28 November 1996 and *Ilascu and others v Moldova and Russia*, 48787/99, Council of Europe: European Court of Human Rights, 8 July 2004.

⁹⁴⁶ C. Eckes, ‘One Step Closer: EU Accession to the ECHR ‘ Const. L. Blog (2nd May 2013) (available at <http://ukconstitutionallaw.org>). See also most recently the CJEU’s opinion 2/13 Opinion 1/13 8.12.14 <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=160882&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=40247>> accessed 8.1.15 regarding the EU’s

Citing the particular challenges here of firstly the unique way in which EU law is often implemented at a national level by the Member States in order to be directly effective.⁹⁴⁷ Secondly, the relationship that exists between the courts of the Member States and the CJEU through the preliminary reference system whereby the CJEU depends not only on the national courts to refer questions to it but also upon the national court to give effect to the CJEU's preliminary ruling when ultimately deciding a particular case she concludes,

‘ultimately, this discussion on the EU's autonomy boils down to the question of how integrated and irreversibly interlocked the EU and national legal orders and judicial systems really are in the face of an external challenge, such as confirmation by a well-respected external judicial authority that the EU breaches human rights. Will such a finding of the ECtHR flare up resistance towards EU law by national courts or public opinion?’⁹⁴⁸

Such tensions have a particular resonance when one considers the determination of the residency rights of EU migrant citizens. Such cases frequently involve issues which involve fundamental ECHR rights and, in particular, the Article 8 ECHR right to respect for private and family life such as in the cases of *Rottman*,⁹⁴⁹ *Zambrano*⁹⁵⁰ and *Dereci*.⁹⁵¹ There has also been heated debate in the UK about the question of the costs of benefits for EU migrant citizens and their families looking for work.⁹⁵² In light of the potential for conflict between the two courts, Eckes explains how ‘the draft agreement declares joint responsibility of the respondent and co-respondent to be the common case.’⁹⁵³ This will for most

accession to the European Convention on Human Rights where the CJEU has emphasised the need to preserve the autonomy of EU law when considering human rights protection.

⁹⁴⁷ Ibid.

⁹⁴⁸ Ibid.

⁹⁴⁹ Case C-135/08, [2010] ECR I-1449 *Rottmann*.

⁹⁵⁰ Case C-34/09 *Gerardo Ruiz Zambrano v Office Nationale de L'emploi (ONEM)* [CJEU, 08 March 2011).

⁹⁵¹ Case C-256/11, *Dereci and others v Bundesministerium für Inneres*, [2011] ECR I-0000.

⁹⁵² For example, in the UK, there has been heated debate about not only the benefits but also the disadvantages of migration especially following 1 January when Romanian and Bulgarian nationals are able to look for work in other EU Member States. For further discussion see for example Business for New Europe, *Migration – Making it work*, (2013) <<http://www.bnegroup.org/images/uploads/publications/files/LATEST- BNE Paper - Migration Making it Work - May 2013.pdf>> accessed 16.5.14.

⁹⁵³ Article 3(6) of the Draft Accession Agreement [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1\(2013\)008rev2_EN.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1(2013)008rev2_EN.pdf) provides ‘If the violation in respect of which a High Contracting Party is a co-respondent

cases unburden the Strasbourg Court from the task of assessing the distribution of competences between the EU and its Member States. However, it does not rule out the *possibility* that the ECtHR chooses to apportion responsibility in the individual case'.⁹⁵⁴

In order to introduce the discussion in this chapter section 2 begins with a contextualised discussion of literature firstly on the wider concept of citizenship which highlights not only the symbolic importance of the citizenship concept at national level and its association with a set of fundamental political, civil and social rights⁹⁵⁵ but also the important role in fostering a sense of allegiance to a particular Member State.⁹⁵⁶

Secondly, section 2 then reviews literature which reveals how EU citizenship, on the other hand, differs sharply to national citizenship in that EU citizenship was primarily focused on the market rights of citizens as well as being parasitic on national citizenship. For it is only by being a national citizen of a Member State can one acquire EU citizenship and the range of additional rights acquired are much narrower. Citizenship cases could therefore be taken as an excellent example of shared competence.

Thirdly, section 2 reviews literature which considers the limits of EU citizenship and in particular literature which highlights that there has been critique of EU citizenship on the grounds that different categories of EU citizens when exercising their residency rights have varying levels of protection from expulsion and this undermines the fundamental status of EU citizenship.⁹⁵⁷

Section 3 explores the Treaty provisions on EU citizenship and in particular residency rights given to EU citizens in Directive 2004/38. This discussion is also contextualised in section 3.4 by a consideration of how the CJEU has played a key

to the proceedings is established, the respondent and the co-respondent shall be jointly responsible for that violation, unless the Court, on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, decides that only one of them be held responsible.'

⁹⁵⁴ C. Eckes, 'One Step Closer: EU Accession to the ECHR' Const. L. Blog (2nd May 2013) (available at <http://ukconstitutionallaw.org>).

⁹⁵⁵ For further discussion see D.Held, *Models of Democracy*, (Polity Press, Cambridge, 1996) at 176

⁹⁵⁶ See further T.Marshall, *Citizenship and Social Class*, (Cambridge: Cambridge University Press, 1950) 28-29.

⁹⁵⁷ P.Craig and G.de Búrca, *EU Law: Text, Cases and Materials*. (5th ed., Oxford: Oxford University Press, 2011) 757.

role in fleshing out the meaning of citizenship and moving away from its economic market focus in favour of a more rights based approach to reflect its fundamental status in EU law⁹⁵⁸ through its expansive and dynamic interpretation of the EU citizenship treaty provisions. The CJEU has done this in its case law on ‘substance of rights’,⁹⁵⁹ but this is controversial because it touches on Member States competence. As Kostakopoulou explains the expansive interpretation of EU citizenship Treaty provisions has involved ‘giving meaning, specificity, and value to [citizenship], thereby establishing new institutional norms which will impact on and modify national legal cultures’.⁹⁶⁰ Such a dynamic approach in this context has largely been through the teleological approach adopted by the CJEU in its interpretation of the wording of the Citizenship Treaty articles⁹⁶¹ and more generally the creation of direct effect enabling EU citizens to rely on EU law. Direct effect was first created of Treaty provisions,⁹⁶² extended to secondary legislation in *Van Duyn*⁹⁶³ whereby an individual is able to rely on an unimplemented directive in a national court, provided certain conditions are met.⁹⁶⁴ Subsequently in *Baumbast*,⁹⁶⁵ the CJEU held that the citizenship provisions were directly effective, although as Shaw notes this was not altogether expected because of the uncertain scope of the relevant Treaty wording.⁹⁶⁶

⁹⁵⁸ See Case C-184/99 *Rudy Grzelczyk v Centre public d’Aide sociale d’Ottignies-Louvain-La-Neuve*, [2001] ECR I-06193 para 31.

⁹⁵⁹ See for example Case C-34/09 *Gerardo Ruiz Zambrano v Office National de L’Emploi (ONEM)*, [2011] ECR I-1177 where the CJEU referred to the ‘substance of rights’ of EU citizens in paragraph 42. Here it ruled that ‘Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union’.

⁹⁶⁰ D.Kostakopoulou, ‘Ideas, Norms and European Citizenship: Explaining Institutional Change’, (2005) 2 *The Modern Law Review* 263.

⁹⁶¹ See also J. Bengoetxea, ‘The Scope for Discretion, Coherence and Citizenship’, in O. Wiklund (ed.), *Judicial Discretion in European Perspective* (Kluwer 2003), 72-74 that the CJEU should engage in activism in the area of rights to enhance a sense of citizenship in the EU and that this might help to make up for the lack of demos in the EU.

⁹⁶² Case 26/62 *NV Algemene transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR I.

⁹⁶³ Case Case 41/74, *Van Duyn v Home Office*, [1974] ECR 1337.

⁹⁶⁴ See P. Craig, and G.de Búrca, *EU Law: Text, Cases and Materials*. (4th ed.Oxford: Oxford University Press, 2007) at 272-277 for a discussion of the conditions for direct effect of Treaty provisions, Regulations and Directives.

⁹⁶⁵ Case C-413/99 *Baumbast and R v Home Department* [2002] ECR I-7091 para 91.

⁹⁶⁶ J.Shaw, *The Transformation of citizenship in the European Union: Electoral Rights and the Restructuring of Political space* (Cambridge University Press, 2007) 163.

Section 3.2 considers the introduction of EU citizenship provisions into EU law following the Treaty of Maastricht with section 3.3 explaining how the residency rights of EU citizens were subsequently strengthened in Directive 2004/38. Section 3.4 then considers the provisions in Directive 2004/38 concerning the expulsion of EU citizens where they have a right of permanent residence.⁹⁶⁷ This also includes a discussion of how such provisions have led to the CJEU being called to adjudicate on expulsion of EU migrant citizens' cases which also raise fundamental rights matters that have previously either been the preserve of national constitutional courts at a national level or fundamental human rights at internal level. Such issues have included considering how even though the Charter represented a major step in fundamental rights protection for EU citizens, there are difficulties for EU citizens when seeking to rely on fundamental protection in that 'Article 51 of the Charter 'restricts the incorporation of these European fundamental rights to the implementation situation'.⁹⁶⁸

However, and as Scott explains, the unique way that fundamental rights are raised in the EU means that 'fundamental rights come in the EU in a collateral way because of the preliminary reference system as against the US'. She cites the example of *Schmidberger*⁹⁶⁹

'freedom of speech comes in a secondary/collateral way because of the preliminary reference system, where the national court has to do the preliminary work. There is something absent and unsatisfactory in the absence of direct action. What these cases show is that there is no direct action, because of the nature of the EU as a polity: EU jurisdiction is

⁹⁶⁷ Article 28(2) of Directive 2004/38. This provision provided that, '2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

(a) have resided in the host Member State for the previous ten years; or

(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.'

⁹⁶⁸ R. Schütze, in G.De Búrca, D.Kochenov, and A.Williams, 'Debating Europe's Justice Deficit: The EU, Swabian Housewives, Rawls, and Ryanair', (November 14, 2013).EUI Working Paper, LAW 2013/11, 2013. < <http://dx.doi.org/10.2139/ssrn.2354568> > last accessed 1.4.14. at 44.

⁹⁶⁹ Case 112/ 00 *Schmidberger* [2003] ECR I-5659 (CJEU).

limited. Is the CJEU ever going to develop its human rights jurisdiction as the US Supreme Court: If it can't then will there always be a form of dissatisfaction in the way justice is done through fundamental rights in the EU'.⁹⁷⁰

Furthermore, the actual operation of the preliminary reference system restricts the CJEU in that the CJEU not only relies heavily on the cooperation of national courts and their willingness to refer questions in the first place but at the end of the day it is up to the national referring court to apply the CJEU's ruling to the facts of the case at issue.

Section 4 reviews the CJEU's dynamic and radical interpretation of the citizenship Treaty provisions and explains how it has shifted the emphasis of citizenship from a market focus involving a cross-border element towards a more rights based approach in three particular cases of *Rottman*,⁹⁷¹ *Zambrano*⁹⁷² and *Dereci*.⁹⁷³ In particular, it will be pointed out how the shift in emphasis in these cases in conjunction with the Citizenship articles and the Charter of Fundamental Rights post the Treaty of Lisbon, while they may seem rhetorically attractive, however, have the potential to lead the CJEU into controversial territory with the Member States. This is particularly so in cases involving policy areas where the EU is acting in shared competence areas or on the edge of its competence and in light of the reaffirmation in the Treaty of Lisbon of subsidiarity and its inherent respect for localism. However, despite this, the CJEU has failed to undertake any subsidiarity review in the cases considered. Furthermore, the CJEU has failed to identify a minimum core of EU rights for all EU citizens that are so sacrosanct that they need to be preserved for EU migrant citizens too irrespective of the cross-border requirements and how this impacts upon the division of competence between the EU and the Member States. Jurisdiction over rights puts the role of the CJEU in more sensitive context regarding competence. The CJEU needs to relate this new jurisdiction to constitutional questions of competence and its own institutional role. Even where there is no change in case outcomes an explicit

⁹⁷⁰ J.Scott in G.De Búrca, D.Kochenov, and A.Williams, 'Debating Europe's Justice Deficit: The EU, Swabian Housewives, Rawls, and Ryanair', (November 14, 2013).EUI Working Paper, LAW 2013/11, 2013. < <http://dx.doi.org/10.2139/ssrn.2354568> > last accessed 1.4.14. at 47.

⁹⁷¹ Case C-135/08, [2010] ECR I-1449 *Rottmann*.

⁹⁷² Case C-34/09 *Gerardo Ruiz Zambrano v Office Nationale de L'emploi (ONEM)* [CJEU, 08 March 2011].

⁹⁷³ Case C-256/11, *Dereci and others v Bundesministerium für Inneres*, [2011] ECR I-0000.

explanation of how the CJEU had considered subsidiarity in the CJEU's reasoning would help to improve the quality of the reasoning of the CJEU and consequently enhance the legitimacy of the CJEU's ruling.⁹⁷⁴

A subsequent chapter will form a case study which will illustrate the theoretical framework in this thesis by proposing a normative argument of how a subsidiarity and proportionality review applied to competences could be anchored by the CJEU when determining the residency rights of EU citizens who are non-economically active with particular reference to the cases of *Rottman*,⁹⁷⁵ *Zambrano*⁹⁷⁶ and *Dereci*⁹⁷⁷.

2. Theoretical Perspectives –the concept of citizenship and its link to political identity which in an EU context means that the competence must be necessarily shared with the Member States

2.1 Introduction

The main purpose of section 2 is to explain with reference to relevant academic critique the context of citizenship and its link to political identity which in an EU context means that the competence must be necessarily shared. The discussion will examine literature firstly on the wider concept of citizenship in order to highlight not only the symbolic importance of the citizenship concept at national level and its association with a set of fundamental political, civil and social rights⁹⁷⁸ but also the important role in fostering a sense of allegiance to a particular Member State.⁹⁷⁹

⁹⁷⁴ N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.'

⁹⁷⁵ Case C-135/08, [2010] ECR I-1449 *Rottmann*.

⁹⁷⁶ Case C-34/09 *Gerardo Ruiz Zambrano v Office Nationale de L'emploi (ONEM)* [CJEU, 08 March 2011).

⁹⁷⁷ Case C-256/11, *Dereci and others v Bundesministerium für Inneres*, [2011] ECR I-0000.

⁹⁷⁸ For further discussion see D.Held, *Models of Democracy*, (Polity Press, Cambridge, 1996) at 176

⁹⁷⁹ See further T.Marshall, *Citizenship and Social Class*, (Cambridge: Cambridge University Press, 1950) 28-29.

2.2 The concept of citizenship and its link to political identity which in an EU context means that the competence must be necessarily shared with the Member States

Citizenship, although an ancient concept,⁹⁸⁰ was brought to the fore in the eighteenth century as a modern political and powerfully symbolic concept linked to the development of rights at national level. As Held argues, following the French Revolution in 1789 citizenship was transformed ‘into one common universal status – the citizen (...) This language of universality and equality is what distinguished this moment – the moment of the ”Rights of Man” – from earlier phases in the long march of citizenship.’⁹⁸¹

Examination of other literature by Marshall also highlights the symbolic importance of citizenship of a particular society as a political concept but also reveals that there are two key aspects of citizenship discourses at national level. Firstly, the focus on the rights and duties those citizens have by virtue of their citizenship status with a common thread underpinning these rights Marshall has argued is a respect for the fundamental value of equality: everyone is entitled to be treated as a full and equal member of society, and to be given the means to enjoy that equality.⁹⁸² As T.H Marshall writes,

‘Citizenship is a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is bestowed. There is no universal principle that determines what those rights and duties shall be, but societies in which citizenship is a developing institution create an image of an ideal citizenship against which achievement can be measured and towards which aspiration can be directed.’⁹⁸³

However, there are problems in determining equality as evidenced by Westen who has argued that, in the context of administration of rules, equality is just ‘an

⁹⁸⁰ D.Held, *Models of Democracy*, (Polity Press, Cambridge, 1996) at 176.

⁹⁸¹ Ibid. See also Y.Zilbershats, ‘Reconsidering the Concept of Citizenship’, (2001) *Texas International Law Journal* 689.

⁹⁸² T.Marshall, *Citizenship and Social Class*, (Cambridge: Cambridge University Press, 1950) 28-29.

⁹⁸³ T.Marshall, *Citizenship and Social Class*, (Cambridge: Cambridge University Press, 1950) 24-25.

empty concept’⁹⁸⁴ in that it lacks substantive content thereby requiring particular standards to be developed to determine what inequalities are unacceptable.⁹⁸⁵ Such difficulties tie in with the issue of whether citizenship should mean full equality which in an EU context would entail full harmonisation or whether there should be some version of mutual recognition, to translate market integration concepts to the rights sphere.

There has also been a wealth of literature which has focused on considering the political, civil and social rights of citizens⁹⁸⁶ although more recently in the UK there has been a move towards emphasising the responsibilities of citizens⁹⁸⁷ in order to counter-balance the potentially excessive individualism of rights.⁹⁸⁸ Such a development highlights the tension that exists between viewing a citizens rights as sacrosanct and viewing individual citizens’ rights in light of the needs of the wider community, the latter reflecting a more communitarian view of rights.⁹⁸⁹ In

⁹⁸⁴ P. Westen, in ‘The empty idea of equality’, (1992) 95 (3) Harvard Law Review.

⁹⁸⁵ Ibid and who writes at 547 writes ‘Equality is an empty vessel with no substantive moral content of its own. Without moral standards, equality remains meaningless, a formula that can have nothing to say about how we should act. With such standards, equality becomes superfluous, a formula that can have nothing to say about how we should act’.

⁹⁸⁶ Ibid. For a discussion of the two main ways that citizenship has been awarded to an individual, firstly *ius sanguinis* citizenship which is awarded on parentage, secondly *Ius soli* where ‘citizenship is awarded on the basis of birth in a territory’ see I. Honohan, ‘Ius soli Citizenship’, <<http://eudo-citizenship.eu/docs/ius-soli-policy-brief.pdf>> accessed 15.3.15. See also ibid his discussion at 1 that *ius soli* citizenship in 2010 is prevalent in some form ‘in 19 of the 33 countries included in the EUDO Citizenship study’ and ‘has the advantage of offering membership of a given political community to those most likely to live there, to be subject to its laws and to contribute to its society and the economy. It provides a way of promoting social integration and democratic legitimacy, and reducing concerns about internal exclusion and insecurity of residence’.

⁹⁸⁷ For a view which dismisses the argument that duties should be at the essence of citizenship see D.Kochenov, EU Citizenship without Duties (September 10, 2013), (2014) European Law Journal (Forthcoming); University of Groningen Faculty of Law Research Paper 15/2013. Available at SSRN: <<http://ssrn.com/abstract=2323273>> accessed 14.2.14.

⁹⁸⁸ See for example Lord West of Spithead, Hansard, Feb 11 2009 at a second reading of the proposed 2009 Borders, Citizenship and Immigration Bill, who stated, ‘With rights come responsibilities, and those responsibilities must first be demonstrated, ensuring that the benefits of British citizenship are earned. This is at the heart of the Government’s firm-but-fair system.’ See also The Independent, 29.1.15 quoting Teresa May <<http://www.independent.co.uk/news/uk/politics/exclusive-no-way-back-for-britons-who-join-the-syrian-fight-says-theresa-may-9021190.html>> accessed 15.1.15. a recent statement that ‘Citizenship is a privilege, not a right, and the Home Secretary will remove British citizenship from individuals where she feels it is conducive to the public good to do so.’⁹⁸⁸ Such a statement points towards a shift of focus of discussion of UK citizenship not just to discussing rights and duties of citizens but also the extent to which the executive could exercise is discretion to address such a situation by deprivation of citizenship where it is in the public interest to do so.

⁹⁸⁹ For an example of a communitarian view of citizenship see M.Sandel, *Justice*, (Penguin, 2010) 263.

an EU context, this tends to play itself out as a balance between citizens' rights and the principle of integration: on this the CJEU tends to be ambiguous about the status of free movement relative to fundamental rights, sometimes it treats free movement itself as a fundamental right.⁹⁹⁰

On the other hand, Marshall explains how citizenship does not just involve rights and duties but also involves fostering a sense of allegiance of citizens to a particular democratic society which is a more informal one involving 'a direct sense of community membership based on loyalty to a civilisation which is in common possession. It is loyalty of free men endowed with rights and protected by a common law.'⁹⁹¹ The question of citizenship fostering a sense of allegiance to a particular democratic society is more difficult in the EU context though as 'there is no European demos – not a people not a nation. Neither the subjective element (the sense of shared collective identity and loyalty) nor the objective conditions which could produce these (the kind of homogeneity of the organic national-cultural conditions on which peoplehood depend) exist....,' and his view that, 'Integration is not about creating a European nation or people, but about the ever closer Union among the peoples of Europe'.⁹⁹²

2.3 The Limits of EU citizenship

Interestingly in the Treaty of Rome there was no explicit mention of citizenship in the Treaty itself.⁹⁹³ On the other hand, following the introduction of the Treaty of Rome Everson has argued that notions of market citizenship of the Community subsequently arose as a consequence of European integration.⁹⁹⁴ For following the

⁹⁹⁰ For a discussion of a view of EU citizenship without duties see D.Kochenov, EU Citizenship without Duties (September 10, 2013). ELJ 2014 (Forthcoming); University of Groningen Faculty of Law Research Paper 15/2013. Available at SSRN: <<http://ssrn.com/abstract=2323273>> accessed 1.3.14.

⁹⁹¹ T.Marshall, *Citizenship and Social Class*, (Cambridge: Cambridge University Press, 1950) 24-25.

⁹⁹² JHH. Weiler, 'The State "über alles"; Demos, Telos, and the German Maastricht Decision', 1995 NYU Jean Monnet Working Paper No. 6/1995 at 37.

⁹⁹³ However, ideas of an EU citizenship were evident from the writings of J.Monnet, *Memoirs*, (Mayne, Richard Collins, 1978), 173-175.

⁹⁹⁴ M.Everson, 'The Legacy of the Market Citizen', in J.Shaw and G.More, (eds) *New Legal Dynamics of the European Union*, (Clarendon Press, Oxford, 1995) 85.

Treaty of Rome in 1957- through a combination of direct effect,⁹⁹⁵ the preliminary reference system⁹⁹⁶, and the supremacy doctrine⁹⁹⁷ a new and direct relationship had been established between the EC and the nationals of the Member States, the latter playing a key part in the legal and practical realisation of the common market as well as being the recipients of various general rights.⁹⁹⁸ It was on account of this new relationship between the EC and nationals of the Member States following the Treaty of Rome that led Everson to describe the nationals of the Member states as being European market citizens.⁹⁹⁹

What is perhaps less clear at those early stages of market creation is to determine to what extent it was intended that something more dynamic and symbolic than market creation and market citizenship involving the free movement of economically active citizens was at that stage anticipated. For citizenship at a national level is usually associated with stronger ties of belonging¹⁰⁰⁰ than purely economic advantages. Certainly prior to the formal introduction of citizenship into EU law following the Treaty of Maastricht, there were notions of European citizenship pervading the European Commission's proposals¹⁰⁰¹ as well as EU secondary legislation, albeit in the context of residence rights of economically active citizens.¹⁰⁰² But such notions of European citizenship in this EC/EEC secondary legislation were focused around those citizens who were participating in the market or those citizens who did not become a burden on the Member States and were without the requisite health insurance, it was still a question of economic entitlement.¹⁰⁰³

⁹⁹⁵ Cases 26/62 *NV Algemene transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1 and Case 80/70 *Defrenne (No 1) v SABENA* [1971] ECR 445

⁹⁹⁶ Article 257 TFEU.

⁹⁹⁷ Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585.

⁹⁹⁸ M.Everson, 'The Legacy of the Market Citizen', in J.Shaw and G.More, (eds) *New Legal Dynamics of the European Union*, (Clarendon Press, Oxford, 1995) 85.

⁹⁹⁹ *Ibid.*, at 80.

¹⁰⁰⁰ T.Marshall, *Citizenship and Social Class*, (Cambridge: Cambridge University Press, 1950) 28-29.

¹⁰⁰¹ See for example, 'Commission, 'Towards European Citizenship: the granting of special rights', COM (75) 321 final.

¹⁰⁰² See Council Directive 90/364/EEC of 28 June 1990 on the right of residence [1990] OJ L 180/26; Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity [1990] OJ L 180/28; Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students [1993] OJ L 317/59.

¹⁰⁰³ *Ibid.*

It was not until the Treaty of Maastricht that various formal EU citizenship provisions were introduced. In particular, Article 17 TEC provided that,

‘Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship. Citizens of the Union shall enjoy the rights conferred by this treaty and shall be subject to the duties imposed thereby’.

Thus EU citizenship differed to national citizenship in the EU citizenship was parasitic on national citizenship. In addition, as Coutts highlights, ‘The Treaty of Maastricht [therefore] constructed a half-way house: providing the elements of a more political union, namely citizenship, justice and home affairs and some mention of fundamental rights, but not combining them in a meaningful way. By maintaining their separateness, it diminished their impact and the possibility of constructing a meaningful, normatively inspired relationship between the individual and the European Union.’¹⁰⁰⁴

The focus of this section is, however, not to consider in depth the literature concerning the symbolic political importance of citizenship rights at either EU or national level, the role of citizenship in fostering an allegiance to a particular state or, in the EU context, to the EU polity¹⁰⁰⁵ or indeed the development of fundamental and human rights for citizens at an international level¹⁰⁰⁶ or in the context of justice and home affairs.¹⁰⁰⁷ The focus of this thesis is considering how a subsidiarity and proportionality review could be applied to competences when determining the residency rights of EU migrant citizens and space precludes an

¹⁰⁰⁴ S.Coutts, ‘Citizenship of the European Union’, in D.Arcarazo and C.Murphy, *EU Security and Justice Law after Lisbon and Stockholm*, (Hart Publishing, 2014) 95.

¹⁰⁰⁵ Such an allegiance between citizens of the EU and the EU itself is much more difficult where citizens are not aligned to one particular national identity but instead aligned to a supranational identity that is much harder to identify. For further discussion of this see M.Kumm, ‘To be a European Citizen? Constitutional Patriotism and the Constitutional Treaty’, (2005) 11 *Columbia Journal of European Law* 481 and M.Kumm, *The Idea of Thick Constitutional Patriotism and Its Implications for the Role and Structure of European Legal History*, (2005) 6(2) *German Law Journal*.

¹⁰⁰⁶ More recently, other literature has highlighted how the development of fundamental rights has become an aspect of globalisation. See for example K.Nash, ‘Between Citizenship and Human Rights’, (2009) 43 (6) *Sociology* 1068 and who writes that ‘development of human rights takes place primarily through international Treaties with the principle of democracy, self-determination that governs existing understandings of citizenship.’

exploration of the such wider issues in this thesis. The focus of this section is to consider a selection of literature which highlights the contested nature of the concept of EU citizenship and the limits of EU citizenship: this raises the problem of how EU citizenship can ever be more than a half-way house.

In respect of the former, Kochenov argues convincingly how the concept of citizenship is an essentially contested concept.¹⁰⁰⁸ He argues in light of Gallie that both its meaning and the essential characteristics that EU citizenship is composed of are unclear.¹⁰⁰⁹ In particular, he highlights how there are two competing views of citizenship: one relating to status ‘building on the formal legal link existing between any state or other entity-the EU, for instance-and its citizens. The second is citizenship as rights, viewed through the prism of the rights enjoyed by the members of a community’.¹⁰¹⁰ However, as Kochenov points out, EU citizenship does not fall within this second view but rather it is derivative in nature with ‘European citizenship [being] largely left within the virtually exclusive domain of the Member States. It means that the Member States themselves decide who their nationals for Community legal purposes are, thereby automatically conferring on them European citizenship.’¹⁰¹¹

With regard to consideration of the limits of EU citizenship, other literature has adopted a theoretical framework using a legal perspective in order to highlight the limits of EU citizenship. Shuibhne, for example, explains how there are three different types of limits of EU citizenship concept. These are normative, inner and the outer limits of EU citizenship. A normative limit she explains ‘describe the conceptual fundamentals of citizenship as an idea and as a status. These limits concern the potential of political entities to generate a meaningful citizenship and associated rights’.¹⁰¹² An inner limit Shuibhne argues refers to the legal and regulatory space at national level that is preserved for EU Member States by the Treaties ‘into which the EU citizenship should not intrude’.¹⁰¹³ An outer limit she explains refers to the limits imposed by the interpretation by the CJEU of the

¹⁰⁰⁷ S.Couts, ‘Citizenship of the European Union’, in D.Arcarazo and C.Murphy, *EU Security and Justice Law after Lisbon and Stockholm*, (Hart Publishing, 2014).

¹⁰⁰⁸ D.Kochenov, ‘Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights’, (2009) 15 *Columbia Journal of European law* at 175.

¹⁰⁰⁹ *Ibid.*

¹⁰¹⁰ *Ibid.*

¹⁰¹¹ *Ibid.*, 182.

¹⁰¹² See N.Shuibhne, ‘EU Citizenship after Lisbon’, in D.Ashiagbor, N.Countouris and I.Lianos, (eds) *The European Union after the Treaty of Lisbon*, (Cambridge University Press, 2012) at 168

¹⁰¹³ *Ibid.*

wording of the Treaties in this context.¹⁰¹⁴ So, for example in *Baumbast*¹⁰¹⁵, in para 90-91 the CJEU 90 explicitly referred to the limits to its interpretation of EU citizenship and residency rights when it ruled that,

‘In any event, the limitations and conditions which are referred to in Article 18 EC and laid down by Directive 90/364 are based on the idea that the exercise of the right of residence of citizens of the Union can be subordinated to the legitimate interests of the Member States. In that regard, according to the fourth recital in the preamble to Directive 90/364 beneficiaries of the right of residence must not become an unreasonable burden on the public finances of the host Member State. However, those limitations and conditions must be applied in compliance with the limits imposed by Community law and in accordance with the general principles of that law, in particular the principle of proportionality. That means that national measures adopted on that subject must be necessary and appropriate to attain the objective pursued (see, to that effect, Joined Cases C-259/91, C-331/91 and C-332/91 *Alluè and Others* [1993] ECR I-4309, paragraph 15)’.

However, does such an approach sufficiently capture the true extent of the limits of EU citizenship? Jo Shaw, for example, argues that there is another limit of EU citizenship. This is the concept of the symbolic limit of EU citizenship which she explains as being ‘the fact that even those exercising rights associated with the European integration process (e.g. consumer rights enhanced as a result of a supranational harmonisation) typically do not see themselves as acting in the guise of EU citizens.’¹⁰¹⁶ Weiler too has argued that,

‘there is no European demos – not a people not a nation. Neither the subjective element (the sense of shared collective identity and loyalty) nor the objective conditions which could produce these (the kind of homogeneity of the organic national-cultural conditions on which peoplehood depend) exist....,’

¹⁰¹⁴ Ibid.

¹⁰¹⁵ Case C-413/99, *Baumbast and R v Home Department* [2002] ECR I-7091

¹⁰¹⁶ J.Shaw, ‘EU Citizenship and the edges of Europe’, Working Paper 2012/19 at 5.

and that, ‘Integration is not about creating a European nation or people, but about the ever closer Union among the peoples of Europe’.¹⁰¹⁷ On a more practical note Careera has highlighted how EU citizenship in the context of free movement of EU citizens is limited by the fact that,

‘the principle of free movement is still dependent on a degree of financial self-sufficiency of the person moving. Residence rights will not be granted to those EU citizens who lack sufficient resources to cover themselves in the hosting state (i.e. the requirement to provide proof of adequate means of subsistence and health insurance). Access to residence and the employment market, the social system, and the educational system continues to be subject to excessive economic conditions and practical obstacles.’¹⁰¹⁸

These limits on EU migrant citizens will be considered further in section 4.

2.4 The Problems of differing levels of protection from expulsion in a host Member State for different categories of EU migrant citizens in Directive 2004/38

A final limit of EU citizenship highlighted in academic literature is in respect of the palpable tension that exists between on the one hand the Union’s concern to protect an EU migrant citizens’ residence rights in Directive 2004/38 and, on the other, the Member State’s right to expel EU migrant citizens on the grounds of public policy or public security pursuant to Article 45(3) TFEU. As Kostakopoulou and Ferreira point out,

‘the public security, public policy and public health derogations from the free movement have been marked by a disjunction between governmental interests and sovereign power and EU regulation. Member States have been keen to maintain the vestiges of their sovereignty in the sphere of migration law. Accordingly, they have preserved the power to restrict the free movement rights of Union citizens and their family members on

¹⁰¹⁷ J.H.H. Weiler, ‘The State “über alles”; Demos, Telos, and the German Maastricht Decision’, 1995 NYU Jean Monnet Working Paper No. 6/1995 at 37.

¹⁰¹⁸ S.Careera, ‘What does Free Movement mean in Theory and Practice in an Enlarged EU’, 11(6) European Law Journal, 699-721 at 700 at 701-2.

public security, public policy and public health grounds (Article 45(3)).¹⁰¹⁹

However, despite this, Kostakopoulou and Ferreira point out, any derogation on the grounds of public policy and public security cannot ‘be invoked in order to serve economic ends even in time of recession, and cannot be imposed automatically’.¹⁰²⁰ This is now in Directive 2004/38. In addition, Kostakopoulou and Ferreira highlight how ‘the Court’s clear preference for a rights-based approach to the interpretation of the Treaty’s derogations from free movement in the internal market shields individuals from the discretionary power of states.’¹⁰²¹ As protected persons, their interest takes priority over the interests of states.’¹⁰²² Section 3.3 will consider further the derogations in Article 27(2) of Directive 2004/38 which provides that,

‘measures taken on grounds of public policy or public security shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.’¹⁰²³

Other authors have focused on considering how the extent of protections put in place to protect EU migrant citizens when Member States are seeking to deport them. For example, Craig and de Búrca highlight how there have been substantive and procedural protections put in place to protect EU migrant citizens when faced with an expulsion order.¹⁰²⁴ Article 28 of Directive 2004/38 in particular provides that when a Member State makes an expulsion order it must

¹⁰¹⁹ T.Kostakopoulou and N.Ferreira, ‘Testing Liberal Norms: the Public Policy and Public Security Derogations and the Cracks in European Union Citizenship’, (May 29, 2013), Warwick School of Law, Legal Studies paper No Paper No 2013/18 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2271722> accessed 16.6.14 at 5.

¹⁰²⁰ Ibid., at 6.

¹⁰²¹ Ibid., at 6.

¹⁰²² T.Kostakopoulou and N.Ferreira, Testing Liberal Norms: the Public Policy and Public Security Derogations and the Cracks in European Union Citizenship’ Warwick School of Law, Legal Studies paper No 2013/18 <http://ssrn.com/abstract=2271722>> accessed 14.5.14. at 6.

¹⁰²³ See for example Case 30/77, *Bouchereau*, [1977] ECR 1999.

¹⁰²⁴ Craig, P., and de Búrca, G., *EU Law: Text, Cases and Materials*. (5th ed., Oxford: Oxford University Press, 2011) 756-758.

‘take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin’. Extra protections are also given to citizens who have resided in host member state for more than 10 years – Art 28(3) provides that ‘an expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security’.

However, despite such protections for EU migrant citizens there are particular difficulties when restricting an EU migrant citizens’ rights on the grounds of public security (*PI* and *Tsakouridis*).¹⁰²⁵ For example Schütze highlights the difficulties for EU migrant citizens in that there are different sources of fundamental rights protection in the form of both the EU’s Charter of Fundamental Rights and also the European Convention on Human Rights when considering the expulsion of EU migrant citizens on the grounds of either public policy or public security. As he explains,

‘the European story is – sadly – much more complicated, since it centres around the three bills of rights identified by Article 6 TEU. For each of these three sources of fundamental rights a distinct European incorporation doctrine has developed in the past. For European fundamental rights as general principles of Union law, two situations have thereby been identified as leading to incorporation: the implementation situation and the derogation situation. The more problematic one here is doubtless the latter. For what is a derogation from Union law, and what is the constitutional rationale for insisting on a common sphere of justice here? The second source of European fundamental rights is the Charter, and it seems that Article 51 of the Charter restricts the incorporation of these European fundamental rights

¹⁰²⁵ Case 348/09 *PI v Oberbürgermeisterin der Stadt Remscheid*, and Case 145/09 *Land Baden-Württemberg v Panagiotis Tsakouridis*. See further S. Coats, ‘Citizenship of the European Union’, in D. Arcarazo and C. Murphy, *EU Security and Justice Law after Lisbon and Stockholm*, (Hart Publishing, 2014) at p.94. For a more general discussion of EU Security and Justice Law after Lisbon and Stockholm see D. Acosta Arcarazo and C. Murphy (eds.) *EU Security and Justice Law after Lisbon and Stockholm*, (Hart Publishing 2014)

to the implementation situation. We also have a third –future- direct source of fundamental rights: the ECHR.¹⁰²⁶

The existence of three separate sources of fundamental rights at both supranational level and national level he concludes has led to ‘a gradual blurring of the federal/state distinction which contrasts with the original idea to create separate spheres of justice’.¹⁰²⁷

With the above literature in mind and the difficulty of having three sources of fundamental rights, the remainder of this section focuses on considering to the implications of having in Directive 2004/38 differing levels of protection against expulsion between different categories of EU migrant citizens. For in addition to literature highlighting the limits and contested nature of EU citizenship, there has been critique of EU citizenship on the grounds that different categories of EU migrant citizens have varying levels of protection from expulsion when in a host Member State and that this undermines the fundamental status of EU citizenship. For example, Craig and de Búrca point out that examination of Directive 2004/38 reveals although there is a standard level of protection against the expulsion of migrant EU citizens, there are also additional protections against expulsion for those EU migrant citizens who have gained permanent residence in a particular Member State.¹⁰²⁸ So, for example, extra protections are given to citizens who have resided in host member state for more than 10 years with Art 28(3) providing that ‘an expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security.’¹⁰²⁹ This is related to subsidiarity in that there is a margin of appreciation for States in the interpretation of derogations which is important as it is the Member State court who is best

¹⁰²⁶ R.Schütze, ‘A European incorporation doctrine: Human Rights and the Member States’ in De Búrca, G., Kochenov, D., and Williams, A., ‘Debating Europe’s Justice Deficit: the EU, Swabian Housewives, Rawls and Ryanair’ EU1 working Paper LAW 2013/11, 2013 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2354568> 1.3.14 at 45.

¹⁰²⁷ Ibid.

¹⁰²⁸ P.Craig and G.de Búrca, *EU Law: Text, Cases and Materials*. (5th ed., Oxford: Oxford University Press, 2011) 757.

¹⁰²⁹ P.Craig and G.de Búrca, *EU Law: Text, Cases and Materials*. (5th ed., Oxford: Oxford University Press, 2011) 757. For a wider discussion of how the CJEU has approached the interpretation of the Area of freedom, security and justice and the privileging of aggregate security interests over the interests of individuals in the post Lisbon period see M.Avbelj, ‘Security and the Transformation of the EU Public Order’ Special Issue Lisbon v Lisbon [2013] German Law Journal 2057-2073.

placed to determine the level of public security risk posed by a particular individual.

Callaert too has explained how different categories of EU migrant citizens have varying levels of protection from expulsion when in a host Member State in EU law and that this contrasts with the approach by the European Court of Human Rights.¹⁰³⁰ So, for example, he explains how, on the one hand,

‘under EU law the status and rights which a person seeking protection from expulsion is entitled to claim will vary according to whether this person is an EU citizen, a person who has exercised his right of freedom of movement, a family member of one of the former categories or none of the above.’¹⁰³¹ Even though the CJEU does seek to harmonise the protection enjoyed by each of these categories through increased reliance on the notion of EU citizenship,¹⁰³² differences still remain in relation to the rights attached to each of these categories.¹⁰³³ In addition, as recently emphasised by the ECJ, under EU law the protection of the family life of EU citizens is primarily designed to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the EC Treaty’.¹⁰³⁴

On the other hand, he explains how,

‘by contrast, the decisive consideration when assessing whether protection from expulsion should be granted under art.8 ECHR will not so much be the nationality or legal status of the persons concerned, but rather the extent of their social integration in the host country. This is evaluated by reference to criteria relating to the personal situation of an applicant and

¹⁰³⁰ J.Callewaert, ‘The European Convention on Human Rights and European Union law: a long way to harmony’, (2009) *European Convention on Human Rights Law Review*, 779.

¹⁰³¹ J.Callewaert, ‘The European Convention on Human Rights and European Union law: a long way to harmony’, (2009) *European Convention on Human Rights Law Review*, 779 and who cites among others, *Carpenter* (C-60/00) [2002] E.C.R. I-6279; *Poirrez v Caf de la Seine Saint-Denis* (C-206/91) [1992] E.C.R. I-6685 ECJ; *Trojani v Centre Public d'Aide Sociale de Bruxelles* (C-456/02) [2004] E.C.R. I-7573 ECJ; *Proceedings brought by Turpeinen* (C-520/04) [2006] E.C.R. I-10685 ECJ; *Metock v Minister for Justice, Equality and Law Reform* (C-127/08) [2009] Q.B. 318 ECJ

¹⁰³² J.Callewaert, ‘The European Convention on Human Rights and European Union law: a long way to harmony’, (2009) *European Convention on Human Rights Law Review*, 779 and who cites *Turpeinen* (C-520/04) [2006] E.C.R. I-10685.

¹⁰³³ As recently illustrated in *Metock* (C-127/08) [2009] Q.B. 318.

¹⁰³⁴ *Metock* (C-127/08) [2009] Q.B. 318 at [56]. See also *Mouvement contre le Racisme, l'Antisemitisme et la Xenophobie ASBL (MRAX) v Belgium* (C-459/99) [2002] E.C.R. I-6591 ECJ at [53]; *European Commission v Germany* (C-441/02), judgment of April 27, 2006 ECJ at [109].

his family members, which will necessarily involve an element of duration.¹⁰³⁵ Thus, while under EU law the specific legal category to which a foreigner belongs will usually be decisive for determining the protection against expulsion to which he is entitled, any foreigner can qualify for protection under art.8, regardless of his nationality or legal status, provided his actual links with the host country are sufficiently strong'.¹⁰³⁶

Secondly, he explains how

‘there are important differences between the two systems as regards the procedural safeguards against expulsion. On the one hand, the Strasbourg Court declined to apply art.6 ECHR to expulsion procedures, considering that, decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of art.6 of the Convention. On the other hand, however, and in stark contrast to the Strasbourg approach, under EU law an increasing number of safeguards, comparable to those laid down in art.6 ECHR, are being provided in expulsion procedures’.¹⁰³⁷

Such differing levels of protection between EU citizens runs counter to the rhetoric and symbolism of EU citizenship and its fundamental status in EU law¹⁰³⁸ i.e. as regards equality. This raises difficult questions as to the intensity of any proportionality review not only as to whether the CJEU should articulate in its reasoning a level of deference to the national judgements, equivalent to the

¹⁰³⁵ J.Callewaert, ‘The European Convention on Human Rights and European Union law: a long way to harmony’, (2009) European Convention on Human Rights Law Review, 779 referring to the full list of these criteria as being found in the judgments given in the cases of *Boultif v Switzerland* (2001) 33 E.H.R.R. 50 ECtHR, *Üner v Netherlands* (2006) 45 E.H.R.R. 14 ECtHR and *Maslov v Austria* (App. No.1638/03), judgment of June 23, 2008 ECtHR. See C. Steinorth, “Üner v The Netherlands: Expulsion of Long-term Immigrants and the Right to Respect for Private and Family Life” (2008) 8

H.R.L. Rev. 185.

¹⁰³⁶ J.Callewaert, ‘The European Convention on Human Rights and European Union law: a long way to harmony’, (2009) European Convention on Human Rights Law Review, 779.

¹⁰³⁷ J.Callewaert, ‘The European Convention on Human Rights and European Union law: a long way to harmony’, (2009) European Convention on Human Rights Law Review, 779 citing e.g. Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77; Directive 2003/109 concerning the status of third-country nationals who are long-term residents [2003] OJ L16/44. See also art.47 of the EU Charter on Fundamental Rights.

¹⁰³⁸ J.Callewaert, ‘The European Convention on Human Rights and European Union law: a long way to harmony’, (2009) European Convention on Human Rights Law Review, 779.

margin of appreciation doctrine under the ECHR, in this context but also what role the Charter of Fundamental Rights should play in this respect especially in light of the impending accession of the EU to the ECHR.¹⁰³⁹ The question of deference or some kind of margin of appreciation here is about the application of subsidiarity and proportionality: the decision to apply some kind of deference reflects subsidiarity, the degree of deference can be analysed more under the heading of proportionality.

2.5 Conclusion

Thus this section has reviewed literature explaining the context of EU citizenship and its link to political identity, which in an EU context means that competence must necessarily be shared. It has also reviewed literature which highlights some of the limits of EU citizenship as well as the contested nature of EU citizenship. Finally, critique of EU citizenship on the grounds that different categories of EU migrant citizens have varying levels of protection from expulsion when in a host Member State and that this undermines the fundamental status of EU citizenship was also considered.

The next section 3 considers the formal introduction of the Treaty provisions on EU citizenship following the Treaty of Maastricht and the subsequent strengthening of the citizenship residency rules in Directive 2004/38. In addition, it explains how despite EU citizenship being parasitic on national citizenship and focused on the market rights of EU citizens, the CJEU has started to play a key role in developing EU citizenship in two ways. Firstly in fleshing out the meaning of citizenship and moving EU citizenship away from its economic market focus in favour of a more rights based approach to reflect its fundamental status in EU law.¹⁰⁴⁰ Secondly, how the CJEU in this case when considering the scope of residence rights led to a consideration of the wider Treaty right of non-discrimination. On the other hand, a subsequent section 4 will explain how despite such development of EU citizenship by the CJEU that the CJEU displays a

¹⁰³⁹ See further S.Sanchez, 'The Court and the Charter: the Impact of the entry into force of the Lisbon Treaty on the ECJ's approach to fundamental rights', (2012) 49(5) Common Market Law Review.

¹⁰⁴⁰ See Case C-184/99 *Rudy Grzelczyk v Centre public d'Aide sociale d'Ottignies-Louvain-La-Neuve*, [2001] ECR I-06193 para 31.

pro-union interpretative tendency by persistently failing to consider subsidiarity expressly in its case law in this context and in particular the identification of limits to its competences through subsidiarity analysis. This is problematic as any pro-union interpretative tendency especially when identifying the limits to its competences through subsidiarity analysis has the potential to affect the quality of its reasoning and undermine any recommendation to anchor a subsidiarity and proportionality review. Furthermore, any pro-union interpretative tendency by the CJEU when considering the legitimate objectives of the Member States against the general interest of the internal market also has the potential to affect the quality of its reasoning¹⁰⁴¹ and undermine any recommendation to anchor a subsidiarity and proportionality review. This runs counter to the recent affirmation by the Treaty of Lisbon of subsidiarity and a respect for localism.

3. Legal Perspectives: Directive 2004/38 and the distinction between economically active and non-economically active EU citizens

3.1 Introduction

Section 3 explores firstly the Treaty provisions on EU citizenship and the residence rights of EU citizens in Directive 2004/38. This includes firstly a discussion of the distinction drawn between economically active and economically inactive EU citizens in relation to residency rights given to EU citizens in Directive 2004/38. Secondly, there is a critical discussion of the provisions regarding the expulsion of EU migrant citizens where they have had periods of imprisonment pursuant to Directive 2004/38. This includes a consideration of how the CJEU has emphasised the fundamental status of EU citizenship in *Sala* and has made inroads into the idea that nationals of the Member States exercising their right of free movement must be economically self-sufficient and must not become a burden on the host Member State when interpreting the scope of the residency rights of EU citizens.¹⁰⁴² It also includes a critical discussion of how residence rights of EU citizens were reaffirmed and strengthened in the Treaty of Lisbon and the Charter of Fundamental Rights.

¹⁰⁴¹ N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.'

¹⁰⁴² Case C-85/96 *María Martínez Sala v Freistaat Bayern* [1998] ECR I-2691.

3.2 The Introduction of EU citizenship provisions following the Treaty of Maastricht

The first formal introduction of EU citizenship Treaty provisions was in 1992 following the Treaty of Maastricht.¹⁰⁴³ The Preamble to that Treaty included that the Heads of the Member States were resolved ‘to establish a citizenship common to nationals of their countries’. Article 8 to that Treaty then included that,

- ‘1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union.
2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby’.

Furthermore, specific articles were included regarding not only various political rights for EU citizens but also residence rights of EU citizens in Article 8a TEC. In respect of the latter this provided that, ‘1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect’.

Article 12 also was added which attempted to ‘convert market citizenship (i.e. whereby the individual is a holder of economic freedoms) into a broader idea of ‘Union citizenship’.¹⁰⁴⁴ However, the actual wording of Article 12 provided that ‘Within the scope of application of this Treaty, and without prejudice to the special provisions contained therein, any discrimination on grounds of nationality shall be prohibited’. This is important as it points to an approach to citizenship rights only as defined to the extent expressed in the Treaties or secondary legislation, and not the actual approach of the CJEU, which is to leave it as an open-ended category, which can be developed on the basis of a general principle of equality/non-discrimination. The latter is not really consistent with conferral and subsidiarity.

¹⁰⁴³ The current key citizenship articles are in Articles 20 and 21 TFEU (ex-Articles 17-22 TEC).

¹⁰⁴⁴ S.Careera, ‘What does Free Movement mean in Theory and Practice in an Enlarged EU’, 11(6) European Law Journal, 699-721 at 700.

One of the most unique and distinguishing aspects of the EU citizenship Treaty articles introduced by the Treaty of Maastricht in Article 17 TEC is that despite being hailed in CJEU case law as having fundamental status in the case law, EU citizenship is parasitic on national citizenship. So the rhetoric of the CJEU is moving ahead of legislative developments. For EU citizenship differs from national citizenship in that in respect of EU citizenship it is only by being a national of a Member State that one acquires EU citizenship. The rights of an EU citizen under the Treaty therefore do not arise autonomously under these provisions.

Furthermore, not only is EU citizenship parasitic on national citizenship but following the introduction of the EU citizenship provisions into the Treaty of Maastricht EU citizenship was primarily concerned with the market rights of citizens.¹⁰⁴⁵ As article F(1) TEU makes clear: 'The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy'. EU citizenship is then linked with national citizenship in that only a national of a Member State can be an EU citizen. This was achieved by Article 17 TEC which provided that,

'Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship. Citizens of the Union shall enjoy the rights conferred by this treaty and shall be subject to the duties imposed thereby'.

In addition, although there was no reference to duties,¹⁰⁴⁶ various rights for EU citizens were spelt out.¹⁰⁴⁷ In respect of residence rights these included in Article 8 A TEU the 'right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect'; in Article 8 B(1)-'the right to vote or stand

¹⁰⁴⁵ M.Everson, 'The Legacy of the Market Citizen', in J.Shaw and G.More, (eds) *New Legal Dynamics of the European Union*, (Clarendon Press, Oxford, 1995)

¹⁰⁴⁶ See further P. Stasinopoulos, 'EU Citizenship as a Battle of the Concepts: *Travailleur v Citoyen*', (2011) 4 (2) *European Journal of Legal Studies* at 78 who writes that 'it would be argued, however, that all EU citizens have the duty to respect the laws and cultures of the states in which they reside when they exercise their right to free movement, but complying with the law is a general duty and not one that can be codified by the institutions of the EU.'

¹⁰⁴⁷ *Ibid* and who points out how 'although the status civitatis is normally associated with both rights and duties, the EU legislation governing citizenship mirrors the sui generis status of the Human Rights law that bypasses the states and gives rights to the individual without following the traditional state/citizen relationship, which is, by nature, reciprocal.

in municipal elections for those citizens residing in Member States of which they are not nationals (Article 8B(1))'; in Article 8B (2) 'the right to vote or stand in European parliamentary elections for the same group of citizens'; in Article 8 C 'that EU citizens finding themselves in the territory of a third country where their own country is not represented have the right to diplomatic or consular protection by any Member State which is represented there'; in Article 138 E 'the right to petition the European Parliament and to apply to the Ombudsman established'. Thus the rights listed here for EU citizens are focused around political and residence rights and do not include any social rights such as the right to welfare entitlement of some kind. EU citizens' rights in the Treaty are therefore much narrower in scope to those commonly recognised rights at national level. The remainder of the thesis focuses on the residency rights of EU citizens rather than the political rights of EU citizens.

3.3 The strengthening of residence rights in Directive 2004/38

Subsequent to the Treaty of Maastricht, there was a further strengthening of the citizenship residency status in Directive 2004/38. Article 1 provided, 'the right of permanent residence in the territory of the Member States for Union citizens and their family members; Article 5 dealt with the formalities in connection with the entry and residence. It provided,

'1. Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport. No entry visa or equivalent formality may be imposed on Union citizens.

2. Family members who are not nationals of a Member State shall only be required to have an entry visa in accordance with Regulation (EC) No 539/2001 or, where appropriate, with national law. For the purposes of this Directive, possession of the valid residence card referred to in Article 10 shall exempt such family members from the visa requirement. Member States shall grant such persons every facility to obtain the necessary visas.

Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure.

3. The host Member State shall not place an entry or exit stamp in the passport of family members who are not nationals of a Member State provided that they present the residence card provided for in Article 10’.

Article 2(2) extended the list of family members of EU citizens that could accompany an EU citizen. It provided that,

‘ "Family member" means:

(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b); the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

3) "Host Member State" means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence’.

On the other hand, in addition to the EU citizenship provisions in the Treaty of Maastricht and the strengthening of the citizenship residency rights in Directive 2004/38, EU migrant citizens may lose their right to reside in certain prescribed circumstances.

Firstly Directive 2004/38 Member States includes the right to expel EU migrant citizens on the grounds of public security. This provision provided that, ‘2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent

residence on its territory, except on serious grounds of public policy or public security.¹⁰⁴⁸

The question of how to deal with EU migrant citizens where they have had periods of imprisonment in the host state raise contentious issues for the CJEU.¹⁰⁴⁹ As EU law in this context is an area of shared competence between the EU and the Member States¹⁰⁵⁰ this leads to difficult questions for the CJEU as to where the balance is to be drawn in cases on matters such as the Member States' preserve of national immigration and public order and public security rules.¹⁰⁵¹ However, questions in this context also straddle what Schütze calls complementary competence. Even though the treaty does not use this term in Article 2 (5) TFEU, so it is a non-legislative competence according to Schütze,¹⁰⁵² the EU has a much weaker competence. Nevertheless, the CJEU could still draw upon subsidiarity to recognise such complementary competences in a particular part of a policy area especially where a policy area already includes shared competences.

A particularly contentious issue in this context is where the CJEU has been called to adjudicate on cases concerning the calculation of the 10 year period pursuant to

¹⁰⁴⁸ However, there was also provision made in this Directive giving various protections to certain categories of migrant EU citizens:

'3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

(a) have resided in the host Member State for the previous ten years; or

(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.'

¹⁰⁴⁹ Case 30/77, *Bouchereau* [1977] 2 CMLR 800.

¹⁰⁵⁰ As Schütze in P.Craig, *The Lisbon Treaty, Law, Politics, and Treaty Reform*, (Oxford, OUP, 2010) at 5 points out, following the Treaty of Lisbon, these shared competences 'remain the ordinary competences of the European Union. Unless the Treaties expressly provide otherwise, an EU competence will be shared.' Furthermore, C.Barnard and S.Peers, *EU law*, (OUP, 2014) at 108 point out that Member States may 'exercise their competence to the extent the Union has not exercised its competence. Once the Union has adopted rules on a particular matter, the Member State action is said to be pre-empted and they may no longer legislate. Given the nature of Union competences, however, pre-emption may only cover those elements of the Union action in question and not the whole area of the activity being regulated'.

¹⁰⁵¹ For a wider discussion of how the CJEU has approached the interpretation of the Area of freedom, security and justice and the privileging of aggregate security interests over the interests of individuals in the post Lisbon period see M.Avbelj, 'Security and the Transformation of the EU Public Order' Special Issue *Lisbon v Lisbon* [2013] German Law Journal 2057-2073.

¹⁰⁵² R.Schütze, 'Lisbon and the Federal Order of Competences: a Prospective Analysis', (2008) European Law Review 709-722.

Article 28(3) of Directive 2004/38 for increased residency protection for EU migrant citizens in a host Member State and the question of whether this 10 year period should include periods of imprisonment. One such example is *Tsakouridis*.¹⁰⁵³ Here the case involved a Mr Tsakouridis, who had been involved in a variety of crimes including eight counts of illegal dealing in substantial quantities of narcotics as part of an organized group was sentenced to six years and six months imprisonment. Consequently, he lost the right of entry and residence in Germany in 2008 and was informed by that he was liable to an expulsion measure to Greece.¹⁰⁵⁴

Upon appeal of his case by the Higher Administrative Court of Baden Württemberg and following some debate as to the meaning of imperative grounds of public security pursuant to Directive 2004/38, a question was submitted to the CJEU which in para 22 ‘asks essentially to what extent absences from the host Member State during the period referred to in Article 28(3)(a) of Directive 2004/38, that is, during the 10 years preceding the decision to expel the person concerned, prevent that person from enjoying the enhanced protection laid down in that provision’.¹⁰⁵⁵

In respect of defining the meaning of public security, the CJEU held in para 43 that this covers both a member State’s internal and its external security. ‘ In considering whether dealing in narcotics falls within the public security exception the CJEU notes how the operation of groups dealing with narcotics often were associated with ‘impressive economic and operational resources and frequently with transnational connections.’¹⁰⁵⁶

The CJEU in para 47 also referred to both its own previous case law and an ECHR case¹⁰⁵⁷ which accepted that trafficking in narcotics as part of an organized group could reach a level of intensity that might directly threaten the calm and physical security of the population as a whole or a large part of it’.

¹⁰⁵³ Case C-145/09, *Land Baden- Württemberg v Panagiotis Tsakouridis*.

¹⁰⁵⁴ *Ibid.*, para 14.

¹⁰⁵⁵ *Ibid.*, para 22.

¹⁰⁵⁶ *Ibid.*, para 46.

¹⁰⁵⁷ Case 221/81 *Wolf* [1982] ECR 3681, paragraph 9, and Eur. Court H.R., *Aoulmi v. France*, no. 50278/99, § 86, ECHR 2006-I).

The CJEU then moved to consider in paragraph 49 how an expulsion order must be based on the Individual conduct of person here in light of Article 27(2) of Directive 2004/38. This latter provision the CJEU pointed out,

‘emphasises that the conduct of the person concerned must represent a genuine and present threat to a fundamental interest of society or of the Member State concerned, that previous criminal convictions cannot in themselves constitute grounds for taking public policy or public security measures, and that justifications that are isolated from the particulars of the case or that rely on considerations of general prevention cannot be accepted’.

Finally, in para 50, the CJEU also advised that in respect of undertaking a proportionality assessment whilst accepting that fundamental rights can be restricted in the event of a sufficiently serious threat to public security, account must be taken of the exceptional nature of the threat to public security as a result of the personal conduct of the person concerned must be undertaken alongside other factors. Such factors included the risk of offending and level of involvement of the criminal in the activity at issue must be balanced against the ‘risk of compromising the social rehabilitation of the Union citizen in the State in which he has become genuinely integrated, which, as the Advocate General observes in point 95 of his Opinion, is not only in his interest but also in that of the European Union in general’. The CJEU then added that in respect of the application of Directive 2004/38, ‘a balance must be struck more particularly between the exceptional nature of the threat to public security as a result of the personal conduct of the person concerned, assessed if necessary at the time when the expulsion decision is to be made’ and a number of other factors. These factors the CJEU ruled included on the one hand, the penalties and sentences imposed by the Member State. Secondly, the degree of involvement in the criminal activity by Tsakouridis and the extent of risk that there was of him reoffending. On the other hand, the CJEU pointed out they also included ‘the risk of compromising the social rehabilitation of the Union citizen in the State in which he has become genuinely integrated, which, as the Advocate General observes in point 95 of his Opinion, is not only in his interest but also in that of the European Union in general’.

Ultimately, the CJEU, in undertaking a proportionality assessment, ruled in para 53 that the national court should ‘assess whether the interference contemplated is proportionate to the legitimate aim pursued, in this case the protection of public security.’ Furthermore, and by way of guidance to the national court, it advised that the national court should take account,

‘in particular of the nature and seriousness of the offence committed, the duration of residence of the person concerned in the host Member State, the period which has passed since the offence was committed and the conduct of the person concerned during that period, and the solidity of the social, cultural and family ties with the host Member State. In the case of a Union citizen who has lawfully spent most or even all of his childhood and youth in the host Member State, very good reasons would have to be put forward to justify the expulsion measure (see, to that effect, in particular, *Maslov v. Austria*, §§ 71 to 75).’¹⁰⁵⁸

However, despite this case involving shared competence areas as well as the sensitivity of defining of rights sharpening the subsidiarity concern, the CJEU paid little attention to subsidiarity in its ruling. With this in mind, it is proposed here that any subsidiarity and proportionality review in this case concerning whether the calculation of the 10 year period pursuant to Article 28(3) of Directive 2004/38 for increased residency protection should include periods of imprisonment. This, it is suggested, should at the very least involve the CJEU making explicit reference in its reasoning to, on the one hand, how it has undertaken a subsidiarity and proportionality review. The CJEU needs to do this much more systematically. Such an approach would not only be respectful of the rule of law but would improve quality of decision making by the CJEU thus enhancing the legitimacy of the CJEU in the eyes of the national courts of the Member States. Even where there is no change in case outcomes an explicit explanation of how the CJEU had considered subsidiarity in the CJEU’s reasoning

¹⁰⁵⁸ See, to that effect, in particular, *Maslov v. Austria*, [2008] ECHR [GC] 1638/03 (23 June 2008) §§ 71 to 75.

would help to improve the quality of the reasoning of the CJEU and consequently enhance the legitimacy of the CJEU's ruling.¹⁰⁵⁹

Any such review should include considering firstly, what is the overall degree of competence that has been transferred to the EU in this context. This would include considering both the general and the specific competence and whether competence involves a consideration of the limits of shared competence in the internal market and any derogation on the grounds of public security for the free movement of persons rules and the extent to which the EU is acting on the edge of its competence in relation to interfering with the Member States' laws in the context of criminal law.

This is an important question as the CJEU has frequently adopted an expansionary approach demonstrating a pro-union interpretative tendency when approaching competence in internal market cases and as Davies writes prior to the Treaty of Lisbon, 'Alas, as every Community lawyer knows, there could hardly be more open-ended and ambiguous competences than those assigned to the Community.'

¹⁰⁶⁰ Furthermore, Conway writes that 'the conceptual pull of the concept of 'internal market' or 'common market' make defining the limits of EU competence very difficult.'¹⁰⁶¹

Yet following the Treaty of Lisbon, Article 5 TEU clearly defines the EU as an organization of conferred and shared powers. Craig highlights 'the Laeken Declaration and subsequent discussion of Treaty reform was premised on the basis that there were concerns voiced about 'competence creep', more especially in relation to two of the most general Treaty provisions, Article 95 and 308 EC'.

¹⁰⁶² However, Craig then explains that despite the Treaty of Lisbon, 'problems still remain' and that, 'the Treaty of Lisbon will..... do little if anything to

¹⁰⁵⁹ N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.'

¹⁰⁶⁰ Gareth Davies, *Subsidiarity: The Wrong Idea, In the Wrong Place, At the Wrong Time*, (2006) 43 *Common Market Law Review* 63- 84 at 65'.

¹⁰⁶¹ G.Conway 'Conflicts of Competence Norms in EU Law and the Legal Reasoning of the ECJ' 11 (9) *German Law Journal* at 967-1005 at 970.

¹⁰⁶² P.Craig, (2010) *The Lisbon Treaty: Law, Politics, and Treaty Reform*, (Oxford: Oxford University Press)

alleviate problems of ‘competence creep’ in the terrain covered by Article 114 TFEU (ex Article 95 TEC).¹⁰⁶³

It should also include considering the implications for the Member State of giving third country national family members of EU citizens who have committed offences and spent time in prison in a particular Member State permanent residence. This could include discussion of any views from the national court what the potential impact might be on immigration for that particular Member State of giving third country national family members of EU citizens who have committed offences and spent time in prison in a particular Member State permanent residence. Access to pertinent public security data or discussion that the national referring court had submitted about the degree of public security risk could be helpful here in informing the CJEU’s consideration of this issue.¹⁰⁶⁴ Far-reaching effects into the public security and immigration of a Member State, for example, would suggest the CJEU is intruding upon public security and immigration competence, which remains with the Member States.¹⁰⁶⁵

Any views of the national court in this context and their reasons for favouring local law-making over centralised action should be explicitly stated. For, and as Kumm has pointed out, the advantages of local law-making over centralised action are three fold and encompass efficiency, democracy and preserving the identities of citizens of the Member State which is easier at a local level than a European level.¹⁰⁶⁶

But on the other hand, in cases concerning a citizens giving third country national family members of EU citizens who have committed offences and spent time in prison in a particular Member State permanent residence the CJEU would also need to demonstrate that it had considered whether the justice provisions in the Charter of Fundamental Rights had been respected by the national authorities when considering the extent to which the substance of the rights of a family member of an EU citizen had been so compromised.

¹⁰⁶³ Ibid., at 188

¹⁰⁶⁴ See also Rasmussen’s conclusion that the ECJ needed to take into account more socio-economic data in its adjudication: H. Rasmussen, *On Law and Policy of the European court of Justice* (Kluwer 1986)]

¹⁰⁶⁵ Article 79 and 80 TFEU.

¹⁰⁶⁶ Kumm *Op. Cit.* 581.

By explicitly including in its judgement the sector-specific criterion it had employed when weighing up such issues in citizenship in cases concerning the calculation of the 10 year period pursuant to Article 28(3) of Directive 2004/38 for increased residency protection should include periods of imprisonment and the weight given by the CJEU to each criterion, this would anchor subsidiarity.

The expulsion of such migrant EU citizens by host Member States¹⁰⁶⁷ also raise a wide variety of fundamental rights matters that have previously either been the preserve of national constitutional courts at a national level or fundamental human rights at international level such as those provided in Article 47 the right to an effective remedy and to a fair trial ‘within a reasonable time by an independent and impartial tribunal previously established by law’ and that ‘legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice’. It also includes in Article 48, 49 and 50 that various procedural safeguards are adhered to such as a presumption of innocence and a right of defence, as well as various principles of justice such as ensuring the legality and proportionality of criminal offences and penalties are adhered to.

Secondly, Directive 2004/38 includes that EU migrant citizens may also lose their right to reside if they fail to meet the conditions laid out in Article 7¹⁰⁶⁸ and Article 14(2) of Directive 2004/38.¹⁰⁶⁹ However, Article 14(3) of that Directive does state ‘An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance

¹⁰⁶⁷ See for example the Case 348/09, *P.I. v Oberburgemeisterin der Stadt Remscheid* where the CJEU has elaborated upon the factors that a national court should take into account when issuing any expulsion measure for EU citizens on the grounds of public security.

¹⁰⁶⁸ In the recent case of Case C-333/13 *Dano v Jobcenter Leipzig* the CJEU was asked to consider if a non-economically active EU citizen was entitled to special non-contributory cash benefits that economically inactive Member State nationals are entitled to. After briefly referring firstly to EU citizenship being destined to a general to be the fundamental status of citizens in para 58, but again without elaborating what such a status might entail, and secondly to the principle of non-discrimination in Article 18 TFEU in para 59, it then went on to rule that Ms Dano did not have a right of residence as she did not fulfil the conditions required by Directive 2004/38 section 7(1) (b) regarding having an EU citizen having sufficient resources of their own. Ultimately in para 81, the CJEU therefore concluded that as Ms Dano had no right of residence she was not entitled to the principle of non-discrimination. In drawing this conclusion particular emphasis was also given in para 76 to the purpose of Article 7(1) (b) of Directive 2004/38 namely ‘to prevent economically inactive Union citizens from using the host Member State’s welfare system to fund their means of subsistence’.

¹⁰⁶⁹ These conditions are laid out in Article 7, 12 and 13 Directive 2004/38. These include a right of residence for more than three months for workers, the self-employed, students enrolled at an educational establishment and their prescribed family members provided they all have sufficient resources and sickness insurance.

system of the host Member State.’ This however creates a difficult dividing line: citizens may not become dependent on social assistance, but they may not be expelled immediately if they lack financial resources. It could just be a question of applying *Antonissen* with a bit more liberality, but then the scope of this needs to be clarified by the CJEU. There were also added protections given in Directive 2004/38 to those EU migrant citizens who have resided in a particular host Member State on a long term basis. So, for example, Article 16 of Directive 2004/38 includes that for EU migrant citizens who have lived in the host Member State for more than five years they gain permanent residency status and therefore a Member State cannot expel such citizens or their family members on the grounds of unemployment. There were also protections from expulsion given to those who are seeking work in Article 14 (4) of Directive 2004/38 where such a migrant EU citizen can provide evidence that he or she ‘is continuing to seek employment’ and has a ‘genuine chance of being engaged.’

Furthermore, the criteria for using the derogations are stricter in that Art 28(2) of Directive 2004/38 provides that the Member State can only deport a person who has acquired a right of permanent residence ‘on serious grounds of public policy or public security.

Article 28 (3) (a) Directive 2004/38 further provides that ‘imperative grounds of public security’ measures must be based ‘exclusively on the personal conduct of the individual concerned.’ A Member State is only justified in invoking public policy where such conduct represents: ‘a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted’.¹⁰⁷⁰

Thus this section has considered how a key reason for the insertion of EU citizenship provisions into EU law was to enhance the ‘the justification and acceptability by individuals of public power or authority’¹⁰⁷¹ in the eyes of

¹⁰⁷⁰ Directive 2004/38, Art. 27(2), 2nd para. Note that under Art. 28(2) of Dir. 2004/38 and the 5-year rule there must be “serious” public policy grounds before measures can legally be taken.

¹⁰⁷¹ C.Closa, ‘Limits to the Legitimacy Function of EU citizenship: The Nationality of Member States’, Paper delivered at the Fourth Biennial International Conference of the European Community Studies Association, Charleston, South Carolina May 11-14 1995 <http://www.academia.edu/1436985/Limits_to_the_Legitimacy_Function_of_EU_Citizenship_The_Nationality_of_Member_States> accessed 20.2.14.

European citizens.¹⁰⁷² This is even though the residence rights attaching to EU citizenship in both the Treaty and the Directive 2004/38, which are the focus of this thesis, were, though, predominantly aimed at those EU citizens who were economically active. Finally, consideration was given to the exception in Directive 2004/38 for expulsion of EU migrant citizens. This included a discussion of where the CJEU has been called to adjudicate on cases concerning the calculation of the 10 year period pursuant to Article 28(3) of Directive 2004/38 for increased residency protection for EU migrant citizens in a host Member State and the question of whether this 10 year period should include periods of imprisonment in the case of *Tsakouridis*.¹⁰⁷³ In particular, it was pointed out how despite this case involving shared competence areas as well as the sensitivity of defining of rights sharpening the subsidiarity concern, the CJEU paid little attention to subsidiarity in its ruling. It was therefore suggested that the CJEU, should at the very least make explicit reference in its reasoning to, on the one hand, how it has undertaken a subsidiarity and proportionality review. A brief outline was then proposed of how this might be undertaken. Even where there is no change in case outcomes an explicit explanation of how the CJEU had considered subsidiarity in the CJEU's reasoning would help to improve the quality of the reasoning of the CJEU and consequently enhance the legitimacy of the CJEU's ruling.¹⁰⁷⁴

The next section turns to consider the CJEU's approach to another contentious matter in its citizenship case law: the fundamental status of EU citizenship and making inroads into the idea that nationals of the Member States exercising their right of free movement must be economically self-sufficient and must not become a burden on the host Member State when interpreting the scope of the residency rights of EU citizens

¹⁰⁷² See also S. Andreev, 'The EU 'Crisis of Legitimacy' Revisited: Concepts, Causes and Possible Consequences for the European Politics and Citizens', <eg<http://politicalperspectivesmanchester.files.wordpress.com/2011/02/epru-2007-s1-07.pdf> > accessed 20.2.14.

¹⁰⁷³ Case C-145/09, *Land Baden- Württemberg v Panagiotis Tsakouridis*.

¹⁰⁷⁴ N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.'

3.4 The CJEU, the fundamental status of EU citizenship and residency rights of EU citizens

Despite the limits of EU citizenship in the Treaty and the emphasis in Directive 2004/38 residency rights for economically active EU migrant citizens, a common thread running through the case law of the CJEU is the emphasis by the CJEU of the fundamental status of EU citizenship.¹⁰⁷⁵ Furthermore, the CJEU has adopted an expansive approach to its interpretation of the citizenship Treaty provisions so as to give various residence rights to certain categories of EU citizens even where there is no economic nexus¹⁰⁷⁶ i.e the CJEU in its case law has made inroads into the idea that nationals of the Member States exercising their right of free movement must be economically self-sufficient and must not become a burden on the host Member State when interpreting the scope of the residency rights of EU citizens.

On the other hand, it will be pointed out by the current author how despite EU citizenship cases often involving shared competence areas and touching upon areas of national sensitivity such as immigration and welfare, there was no subsidiarity review undertaken by the CJEU to support the expansive interpretation of EU citizenship in this context. This omission, it will be argued, is a key concern in that it lays the CJEU open to claims that it is failing to respect the rule of law. It is also failing to demonstrate in its reasoning a proper respect for local law making which runs counter to the recent affirmation by the Treaty of Lisbon that subsidiarity is a key legal principle governing the EU law institutions including the CJEU.¹⁰⁷⁷

In order to introduce this discussion, it should be re-emphasised how one of the most unique and distinguishing aspects of the EU citizenship Treaty articles introduced by the Treaty of Maastricht in Article 17 TEC is that despite being hailed as having fundamental status in the case law, EU citizenship is parasitic on national citizenship. Thus EU citizenship differs from national citizenship in that in respect of EU citizenship it is only by being a national of a Member State that

¹⁰⁷⁵ See for example *Grzelczyk v Centre public D'Aide Sociale D'Ottignies-Louvain-La-Neuve* (Case C-184/99) [2002] 1 CMLR 19 para 1.

¹⁰⁷⁶ Ibid.

¹⁰⁷⁷ This builds upon the argument put forward by De Burca that the CJEU is a law making institutions and therefore governed by subsidiarity when interpreting in shared competence areas and discussed previously in chapter 3.

one acquires EU citizenship. The rights of an EU citizen under the Treaty therefore do not arise autonomously under these provisions.

Furthermore, and as Craig and de Búrca highlight, Directive 2004/38 continues to distinguish between economically active and non-economically active EU nationals.¹⁰⁷⁸ However, despite this distinction there seems to be a gap between the CJEU's approach¹⁰⁷⁹ and the more limited legislative provision in Directive 2004/38.

On the other hand, the CJEU has played a key role in fleshing out the meaning of EU citizenship and moving away from its economic market focus in favour of a more rights based approach to reflect its fundamental status in EU law¹⁰⁸⁰ through its expansive and dynamic interpretation of the EU citizenship treaty provisions. The CJEU has done this in its case law on 'substance of rights',¹⁰⁸¹ but this is controversial because it touches on Member States competence. As Kostakopoulou explains the expansive interpretation of EU citizenship Treaty provisions has involved 'giving meaning, specificity, and value to [citizenship], thereby establishing new institutional norms which will impact on and modify national legal cultures'.¹⁰⁸² Such a dynamic approach in this context has largely been through the teleological approach adopted by the CJEU in its interpretation of the wording of the Citizenship Treaty articles¹⁰⁸³ and more generally the creation of direct effect enabling EU citizens to rely on EU law. Direct effect was first created of Treaty provisions,¹⁰⁸⁴ extended to secondary legislation in *Franz*

¹⁰⁷⁸ P.Craig and G.de Búrca, *EU Law: Text, Cases and Materials*. (5th ed., Oxford: Oxford University Press, 2011) 819.

¹⁰⁷⁹ See for example Case C-34/09 *Gerardo Ruiz Zambrano v Office Nationale de L'emploi (ONEM)* [CJEU, 08 March 2011].

¹⁰⁸⁰ See Case C-184/99 *Rudy Grzelczyk v Centre public d'Aide sociale d'Ottignies-Louvain-La-Neuve*, [2001] ECR I-06193 para 31.

¹⁰⁸¹ See for example Case C-34/09 *Gerardo Ruiz Zambrano v Office National de L'Emploi (ONEM)*, [2011] ECR I-1177 where the CJEU referred to the 'substance of rights' of EU citizens in paragraph 42. Here it ruled that 'Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'.

¹⁰⁸² D.Kostakopoulou, 'Ideas, Norms and European Citizenship: Explaining Institutional Change', (2005) 2 *The Modern Law Review* 263.

¹⁰⁸³ See also J. Bengoetxea, 'The Scope for Discretion, Coherence and Citizenship', in O. Wiklund (ed.), *Judicial Discretion in European Perspective* (Kluwer 2003), 72-74 that the CJEU should engage in activism in the area of rights to enhance a sense of citizenship in the EU and that this might help to make up for the lack of demos in the EU.

¹⁰⁸⁴ Case 26/62 *NV Algemene transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

*Grad*¹⁰⁸⁵ whereby an individual is able to rely on an unimplemented directive in a national court, provided certain conditions are met.¹⁰⁸⁶ Subsequently in *Baumbast*,¹⁰⁸⁷ the CJEU held that the citizenship provisions were directly effective as well as emphasising how the directly effective rights at issue must be considered in the broader context of Regulation 1612/68 as a whole. As the CJEU reasoned in para 68,

‘First, Article 12 of Regulation No 1612/68¹⁰⁸⁸ and the rights which flow from it must be interpreted in the context of the structure and purpose of that regulation. It is apparent from the provisions of the regulation, taken as a whole, that in order to facilitate the movement of members of workers' families the Council took into account, first, the importance for the worker, from a human point of view, of having his entire family with him and, secondly, the importance, from all points of view, of the integration of the worker and his family into the host Member State without any difference in treatment in relation to nationals of that State (see, to that effect, Case 249/86 *Commission v Germany* [1989] ECR 1263, paragraph 11).’

Sala is one of the most radical of the early case examples where the CJEU adopted such a teleological approach to the interpretation of the citizenship provisions and, in particular, made significant inroads into the idea that nationals of the Member States exercising their right of free movement must be economically self-sufficient and must not become a burden on the host Member State.¹⁰⁸⁹ The CJEU ruled that an EU citizen who was economically inactive, but was lawfully residing in a host Member State as a matter of German law, was entitled to rely upon the equal treatment provisions to obtain some degree of social assistance.

¹⁰⁸⁵ Case 9/70, *Franz Grad v Finanzamt Traunstein*, [1970] ECR 825.

¹⁰⁸⁶ See P. Craig, and G.de Búrca, *EU Law: Text, Cases and Materials*. (4th ed.Oxford: Oxford University Press, 2007) at 272-277 for a discussion of the conditions for direct effect of Treaty provisions, Regulations and Directives.

¹⁰⁸⁷ Case C-413/99 *Baumbast and R v Home Department* [2002] ECR I-7091 para 84.

¹⁰⁸⁸ This Regulation is now codified as Regulation (EC) No 492/2011 of the European Parliament and of the Council 5 April 2011 on freedom of movement of workers within the Union L141/1 27.5.2011.

¹⁰⁸⁹ Case C-85/96 *María Martínez Sala v Freistaat Bayern* [1998] ECR I-2691.

The facts of the case concerned a Mrs Sala who was a Spanish national living in Germany for 25 years. During this period she had had periodic employment up until 1989. In respect of obtaining the relevant residence permits to allow her to stay in Germany, she received such residence permits allowing her to stay up until 1984. After that date, although she had applied for extension of her residence permit she was not in receipt of the relevant residence permit when in Jan 1993 she applied for a child-raising allowance for her child born during that month. An application for a child-raising allowance was subsequently refused by the German authorities. She therefore took her case initially before the German social court before, following rejection of her application by the German Social Court, making an appeal to the Bayerisches Landessozialgericht . It was during these latter proceedings between Mrs Martínez Sala and Freistaat Bayern (State of Bavaria) concerning the latter's refusal to grant her child-raising allowance for her child that four questions were referred to the CJEU.

The first question focused on whether Ms Sala was a worker for EU law purposes¹⁰⁹⁰ with the second question asking whether a child-raising allowance was a social advantage within the meaning of Article 7(2) of Regulation No 1612/68?¹⁰⁹¹

A third question then asked if it was compatible with the law of the European Union for the BErzGG to require possession of a formal residence permit for the grant of child-raising allowance to nationals of a Member State, even though they are permitted to reside in Germany?'

The CJEU considered the second and third questions together first ruling that the child-raising allowance at issue constituted both a family benefit for the

¹⁰⁹⁰ (1) Was a Spanish national living in Germany who, with various interruptions, was employed until 1986 and, apart from a short period of employment in 1989, later received social assistance under the Bundessozialhilfegesetz (Federal Social Welfare Law, the "BSHG") still, in 1993, a worker within the meaning of Article 7(2) of Regulation (EEC) No 1612/68 or an employed person within the meaning of Article 2 in conjunction with Article 1 of Regulation (EEC) No 1408/71?

¹⁰⁹¹ This Regulation is now codified as Regulation (EC) No 492/2011 of the European Parliament and of the Council 5 April 2011 on freedom of movement of workers within the Union L141/1 27.5.2011.

purposes of Article 4 (1) (h) of Regulation No 1408/71 and a social advantage within the meaning of Article 7(2) of Regulation 1612/68'.¹⁰⁹²

The CJEU then went on to consider the first question regarding whether 'a national of one Member State who resides in another Member State, where he is employed and subsequently receives social assistance, has the status of worker within the meaning of Regulation No 1612/68 or of employed person within the meaning of Regulation No 1408/71'.¹⁰⁹³ It then ruled that such a question was for the national court to decide upon. For, as the CJEU pointed out in paragraph 31, 'there is no single definition of worker in Community law: it varies according to the area in which the definition is to be applied' even though the basic definition of a worker has been set out by the CJEU in *Laurie Blum*.¹⁰⁹⁴

Finally the CJEU considered the fourth question from the referring court regarding 'whether Community law precludes a Member State from requiring nationals of other Member States to produce a formal residence permit in order to receive a child-raising allowance.'¹⁰⁹⁵ The CJEU noted that as Mrs Sala was a national of a Member State who was lawfully residing in Germany that she fell within the 'scope *ratione personae* of the provisions of the Treaty on European citizenship'.¹⁰⁹⁶ Consequently Ms *Sala*, although a Spanish citizen as a matter of German law she was entitled to German citizenship. Thus her entitlement to German citizenship arose under German law, it was not a consequence of the CJEU interpretation of the Treaties. The significance of this point, though, was not made very clearly in the judgment. It therefore raised doubts after the case as to how much of a precedent *Sala* was, since it was possible to distinguish it from other cases where residents of the host Member State were not entitled under the local national law to be a citizen of the host Member State.

¹⁰⁹² Ibid at para 21.

¹⁰⁹³ Case C-85/96 *María Martínez Sala v Freistaat Bayern* [1998] ECR I-2691 at para 29.

¹⁰⁹⁴ Case 66/85 *Deborah Lawrie-Blum v. Land Baden- Württemberg* [1986] ECR 2121.

¹⁰⁹⁵ Ibid., at para 46.

¹⁰⁹⁶ Ibid., at para 60.

However, in light of her entitlement to German citizenship recognised under German law, she was subject to the rules that govern European citizenship and, in particular, the general principle of non-discrimination that all EU citizens are afforded.¹⁰⁹⁷ A fundamental tenet of the general principle of non-discrimination is the right of EU citizens not to be discriminated against on the grounds of nationality.¹⁰⁹⁸ Thus, the CJEU, demonstrating a pro-union interpretative tendency, ruled that Mrs Sala can, by virtue of her being a EU citizen and lawfully resident in the territory of the host Member State, ‘rely on Article 6 of the Treaty in all situations which fall within the scope *ratione materiae* of Community law, including the situation where that Member State delays or refuses to grant to that claimant a benefit that is provided to all persons lawfully resident in the territory of that State on the ground that the claimant is not in possession of a document which nationals of that same state are not required to have and the issue of which may be delayed or refused by the authorities of that State.’¹⁰⁹⁹

The use of the discrimination principle in Article 12 EC as the basis for claiming equal access to a German child-raising benefit for her newborn child Craig and de Búrca have pointed out illustrate how ‘the CJEU in this case was willing to ‘explode the linkages’¹¹⁰⁰ which had previously been required in order for the principle of non-discrimination to apply. It was not necessary for there to be involvement in any economic activity as a worker or service provider, nor was it necessary to show preparation for a future economic activity as a student, etc. Furthermore, Craig and de Búrca discuss how ‘the fact that the CJEU did not base the applicant’s right to residence on Article 18 EC, having found that Germany had authorized her residence (under the terms of a Council of Europe Convention on social and medical assistance), meant that the Court did not have to confront the limiting conditions within that Article, and especially the requirement that she should have sufficient resources

¹⁰⁹⁷ Ibid., para 62.

¹⁰⁹⁸ Ibid., para 62.

¹⁰⁹⁹ Ibid., at para 63-64.

¹¹⁰⁰ See Craig de Búrca *Op.Cit* at 859-860 and who refer to O’Leary S., ‘Putting the Flesh on the Bones of European Union Citizenship’ (1999) 24 *EL Rev* 68, 77-78 and Toner., H ‘Judicial Interpretation of European Union Citizenship/ Consolidation or Transformation’, (2000) 7 *MJ* 158.

to avoid becoming a burden on the social assistance scheme of the State. The CJEU instead based itself simply on Articles 12 and 17(2) of the Treaty'.¹¹⁰¹

Such a ruling was remarkable in several other respects.

Firstly, although Shaw has argued that the CJEU in this case refused to recognize 'care work' as a 'proper' form of work for the purposes of interpreting the Courts reading of the categories which frame the case, i.e. citizenship and free movement rules,¹¹⁰² the CJEU widened the concept of citizenship to include economically inactive persons. In so doing the CJEU was happier to dispense with the need for economic activity than to offer a wide interpretation of work as including care work with some indirect economic dimension to it. Thus, the CJEU has given recognition to Union citizens not just on their legal and economic position within the Union, but also now to their status as citizens of the Union. Consequently, as Wollenschlager writes, this judgment is one of the 'path-breaking decisions which have operated a civic turn in Community law, putting flesh on the bones of the citizenship provision'.

¹¹⁰³

However, this is controversial as the CJEU failed to discuss explicitly the extent to which the CJEU's expansion of EU citizenship to include economically inactive persons¹¹⁰⁴ facilitates the general objective in Article 18(1) TEC of preventing any obstacles to the right of Union citizens to move and reside freely. Nor did it undertake any weighing up of whether their ruling contributes to such a goal or whether it has gone beyond what the Treaty article envisaged. Considerations such as the dangers and costs to the host Member state of permitting non-economically active citizens a right to welfare benefits such as the benefit at issue in this case and the extent of interference with Member

¹¹⁰¹ Ibid.

¹¹⁰² J.Shaw, in *Gender and the Court of Justice*, in *The European Court of Justice* G de Búrca and J.Weiler (eds) (OUP, 2001) at 141.

¹¹⁰³ F.Wollenschlager, 'Union Citizenship and Its Dynamics for Integration beyond the market', paper presented at the EUSA Eleventh Biennial International Conference 2009 <http://www.unc.edu/euce/eusa2009/papers/wollenschl%C3%A4ger_05E.pdf> last accessed 17.6.13.

¹¹⁰⁴ In Case C-85/96 *María Martínez Sala v Freistaat Bayern* [1998] ECR I-2691 she was entitled as a matter of German law to German citizenship.

States policy in this context were also not explicitly discussed and weighed up. Furthermore, and as Rasmussen has argued, socio-economic data is also necessary to underpin the CJEU's decision as,

‘the operation of the balancing technique threatens the survival of many national legislative acts. If fairness and justice should prevail, it seems to be a minimum requirement of the judicial process that a federalism conflict umpiring takes place on the basis of comprehensive socio-economic briefing of the members of the Court’.¹¹⁰⁵

The ruling is also controversial as the text of the Treaties suggests that citizens have rights as are specified in the Treaty: the CJEU inverted this approach and suggests citizens may have rights generally on the basis of an equality principle¹¹⁰⁶, but conceptually this could lead to the complete harmonisation of all of the rights of citizens. If the only connecting basis with EU competence is the principle of equality, there are no limits to the EU's competence when it comes to citizenship. Shared competence should remain with the Member State only so long as the EU does not exercise it. It is hard to see the limits of shared competence if equality is the underpinning conceptual basis, equality itself already having been subject to much debate in academic literature regarding the differing contested conceptions of equality¹¹⁰⁷ that there are or the argument put

¹¹⁰⁵ H. Rasmussen, H., *On Law and Policy in the EU: A Comparative Study in Judicial Policy Making* (Dordrecht: Martinus Nijhoff Publishers, 1986,) at 432.

¹¹⁰⁶ Equality as a legal concept encompassing a principle that like should be treated alike has a long history and can be traced back to the writings of Aristotle Aristotle, *Ethica Nicomachea* V.3.1131a-1131b (Ross, W trans ,1925) and who wrote ‘*Equality in morals means this: things that are alike should be treated alike, while things that are unlike should be treated unlike should be treated unlike in proportion to their unlikeness*’. See also S. Fredman, *Women and the Law* ((Clarendon Press, Oxford, 1997) 7 for further discussion of how the concept of equality was also a key development of liberalist thinking and a discussion of the characteristics of liberalism and which have had an important influence on the law namely ‘rationality, autonomy, individualism, equality before the law; and abstentionist, neutral state, respecting a divide between public and private and based on consent’. There is also a considerable array of literature on the development of the concept of equality which indicates a concept that is both contested and multi-faceted. See for example, Beck, G., ‘The Mythology of Human Rights’, (2008), 21 (3) *Ratio Juris* 312-47at 325 (1956). See also J.N. Gray, ‘On the contestability of social and political concepts’, (1977) 5 *Political Theory* 331-349., C.Swanton, ‘On the essential contestedness of Political Concepts’, (1985) (4) *Ethics* 811-827.

¹¹⁰⁷ S.Fredman, *Women and the Law* (Clarendon Press, Oxford, 1997) at 2 has outlined that there have been three main conceptions of equality. Firstly there is equality of treatment. This conception of equality she submits ‘is predicated on the principle that justice inheres in consistency; hence likes should be treated alike. But this in turn is based on a purely abstract view of justice, which does not take into account existing distributions of wealth and power’. Secondly, she outlines a second conception of equality as one ‘which concentrates on correcting

forward by Westen that, in the context of administration of rules, equality is just ‘an empty concept’¹¹⁰⁸ in that it lacks substantive content thereby requiring particular standards to be developed to determine what inequalities are unacceptable.¹¹⁰⁹ Equality, according to Westen, has nothing to add to the interpretation of the rule ‘that is not already inherent in the substantive terms of the rule itself’.¹¹¹⁰ However, as Chermersky points out,

‘this argument [however] assumes that formalism is possible; that it is practical to apply rules mechanically to decide all of the situations where the rules are supposed to applyBut legal scholars have long discarded a belief in formalism because even the most detailed command must leave to the individual executing the command some discretion. Hence every law-applying act is only partly determined by law and partly undetermined. Once there is discretion in applying laws, we can no longer simply say the law applies to the cases to which it applies. It is imperative to develop a concept of equality to insure consistent, non-discriminatory application of the laws.’¹¹¹¹

Consequently, she surmises that Westen’s view that equality is an empty concept overlooks how equality requires that where there is discretion in applying laws that these are applied even handily. For, as she argues, this ‘is not part of any law, but rather is derived from the notion of equality’.¹¹¹²

Following *Sala* the CJEU then continued to display a pro-union interpretative tendency by further expanding the scope of citizenship rights in its case law in various ways to include various different types of EU non-economically active citizens gaining an entitlement to some limited financial assistance. For example

maldistribution. Such a principle would lead to a focus on equality of results, requiring unequal treatment if necessary to achieve an equal impact’. Finally she outlines a conception of equality where ‘the focus could lie on facilitating personal self-fulfilment, by equalizing opportunities. This differs from both the above conceptions, in that a notion of equality which stresses equal opportunities is consistent with inequality of treatment and inequality of results’.

¹¹⁰⁸ P. Westen, in ‘The empty idea of equality’, (1992) 95 (3) Harvard Law Review, 537–596.

¹¹⁰⁹ Ibid., and who writes at 547 ‘Equality is an empty vessel with no substantive moral content of its own. Without moral standards, equality remains meaningless, a formula that can have nothing to say about how we should act. With such standards, equality becomes superfluous, a formula that can have nothing to say about how we should act’.

¹¹¹⁰ Ibid., at 551.

¹¹¹¹ E. Chermersky, ‘Articles and Commentary of Equality: In Defense of Equality: A Reply to Professor Westen’, (1983) Michigan Law Review at 575.

¹¹¹² Ibid., at 581.

an EU citizen who was a student as falling within the equal treatment provisions of the Treaty for the purposes of a limited grant when he was exercising a right of residence under the Student Directive (now Directive 2004/38) in *Grzelczyk*¹¹¹³ and an EU citizen who was a jobseeker to claim jobseeker's allowance in the UK in *Collins*.¹¹¹⁴

The Court has placed rhetorical emphasis on the fundamental status of citizenship and the rights attached to citizenship in its ruling initially in *Grzelczyk* but also in a line of subsequent case law¹¹¹⁵ that 'Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for'.¹¹¹⁶ This was described by De Waele as "brazen rhetoric".¹¹¹⁷ It also demonstrates how the CJEU's rulings are moving ahead of legislative developments.

Perhaps even more radically, in *Garcia Avello* the CJEU extended citizenship rights to an EU citizen even where there was no cross border element thus severing the link between EU citizenship and market integration itself.¹¹¹⁸

However, even where there is no change in case outcomes an explicit explanation of how the CJEU had considered subsidiarity in the CJEU's reasoning would help to improve the quality of the reasoning of the CJEU and consequently enhance the legitimacy of the CJEU's ruling.¹¹¹⁹ Furthermore, it is important that the CJEU is

¹¹¹³ Case C-184/99, *Grzelczyk v Centre Public D'Aide Sociale D'Ottignies-Louvain-La-Neuve* [2012] 1 CMLR 19

¹¹¹⁴ Case C-138/02, *Collins* [2004] ECR I-2703.

¹¹¹⁵ See for example Cases C-73, *Bressol v Gouvernement de la commune Francaise* [2010] 3 CMLR 20; C-524/06 *Huber v Germany* [2009] 1 CMLR 49; C-158/07 *Forster v Hoofddirectie van de Informatie Beheer Groep* [2009] 1 CMLR 32; C-192/05 *Tas-Hagen v Raadskamer WUBO van de Pensioen-en Uitkeringsraad* [2007] 1 CMLR 23; C-470/04 *N V Inspecteur van de Belastingdienst Oost/Kantoor Almelo* [2006] 3 CMLR 49; C-147/03 *Commission of the European Communities v Austria* [2006] 3 CMLR 39.

¹¹¹⁶ *Grzelczyk v Centre public D'Aide Sociale D'Ottignies-Louvan-La-Neuve* (Case C-184/99) [2002] 1 CMLR 19 para 1.

¹¹¹⁷ 'The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment', (2010) 6(1) *Hanse Law Review* 3-26 at 7: < <http://www.hanselawreview.org/pdf9/Vol6No01Art01.pdf> > last accessed 14.1.14.

¹¹¹⁸ Case C-148/02 *Carlos Garcia Avello v Etat Belge* [2003] ECR I-11613.

¹¹¹⁹ N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.'

explicit in its reasoning about its consideration of how it has concluded that the substance of an EU citizens rights is so compromised that there is no need to consider a cross border element. The question of how the CJEU approaches its reasoning in this context is important as the CJEU has already demonstrated that to adopt different approach to judicial reasoning, as evidenced for example in the cases of *Akrich*¹¹²⁰ and *Metock*,¹¹²¹ can allow it to reach a completely different conclusion. *Akrich* was a preliminary reference concerning a third country national and his right to enter and remain in the UK following his marriage to a British citizen on the grounds that he was entitled to remain in the host Member State as a spouse of a UK citizen. Here the CJEU included in its ruling that Article 10 of Regulation 1612/68 required a third country national ‘who is a spouse of an EU citizen to be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated’.¹¹²² The CJEU then departed from such an approach in the case of *Metock*. The case of *Metock* and others concerned four cases that came before the High Court in Dublin but which were joined together when considered by the CJEU.¹¹²³ The key issue raised in these cases was whether Directive 2004/38 precluded national legislation which required the spouse of an EU citizen to have lived in another Member State before they could lawfully reside in the host Member State.¹¹²⁴

Despite strenuous arguments put forward by the Minister for Justice that to interpret Directive 2004/38 as prohibiting a host Member State from requiring prior lawful residence for a third country national spouse of an EU citizen in another Member State would undermine the national immigration policies of Member States,¹¹²⁵ the CJEU categorically rejected this.¹¹²⁶ Rather it ruled that the benefit of Article 10 of Directive 2004/38 right cannot depend on prior lawful

¹¹²⁰ Case C-109/01, *Akrich*, [2003] ECR I-9607.

¹¹²¹ Case C-127/08, *Blaise Baheten Metock & Others v Minister for Justice, Equality and Law Reform (Metock & Others)*, 3 CKLR 39 (2008)

¹¹²² *Ibid.*, at para 50.

¹¹²³ Case C-127/08, *Blaise Baheten Metock & Others v Minister for Justice, Equality and Law Reform (Metock & Others)*, 3 CKLR 39 (2008)

¹¹²⁴ For further discussion of this case see for egs C.Costello, *Metock: Free Movement and ‘Normal Family Life’ in the Union*, (2009) 46 CML Rev 587 and S.Currie, ‘Accelerated Justice or a Step to Far? Residence Rights for non-EU Family Members and the Courts Ruling in *Metock*’, (2009) 34 EL Rev 310.

¹¹²⁵ Case C-127/08, *Blaise Baheten Metock & Others v Minister for Justice, Equality and Law Reform (Metock & Others)*, 3 CKLR 39 (2008) para 72.

¹¹²⁶ *Ibid.*, at paras 53-54

residence of such a spouse in another Member State.¹¹²⁷ Furthermore, it reconsidered its ruling in *Akrich* in relation to the eligibility for third country nationals married to EU citizens to benefit from rights provided for under Article 10 of Regulation No 1612/68 before ruling in relation to Directive 2004/38 that the Directive did not include any requirement that an EU citizen must have founded a family already before it went to the host Member State.¹¹²⁸ As Currie states, ‘In essence, the ruling enshrines a more equitable approach to third country national family members of Union citizens in circumstances of genuine family union. Reasoning on the individual level, this is surely a fair result’.¹¹²⁹ However, what was the main thrust of the CJEU’s reasoning in this case? Furthermore, does the CJEU consider if there is a minimum core of EU rights of an EU citizen that are sacrosanct and, if so, how balancing of such core rights with other competing rights and legitimate government objectives with reference to ECHR standards could be undertaken.

In respect of the thrust of the CJEU’s reasoning to support such a ruling, this was directed primarily towards the importance of ensuring that the effectiveness of the Directive was not diminished by the existence and retention of the national legislation at issue in this case.¹¹³⁰ So, for example in respect of the CJEU’s reasoning in response to the question raised by the Member State regarding whether Directive 2004/38 precludes legislation of a Member State requiring prior lawful residence for a third country national spouse of an EU citizen in another Member State, the CJEU pointed out that the Directive 2004/38 includes no such provision. Furthermore, the CJEU cites precedent which points out how the Community legislature has recognised the importance of ensuring the protection of the family life of EU citizens in order to eliminate obstacles to the exercise of their free movement rights.¹¹³¹ It also explained that the Member States were already able to limit the entry into the Member State of family members of Union citizens on the prescribed grounds of public policy, public security or public

¹¹²⁷ Ibid.

¹¹²⁸ Ibid., para 58

¹¹²⁹ S. Currie, ‘Accelerated Justice or a Step to Far? Residence Rights for non-EU Family Members and the Courts Ruling in *Metock*’, (2009) 34 EL Rev 310 at 324-5.

¹¹³⁰ See for egs Case C-127/08, *Blaise Baheten Metock & Others v Minister for Justice, Equality and Law Reform (Metock & Others)*, 3 CKLR 39 (2008) para 84.

¹¹³¹ Ibid., para 56 where the CJEU cites the cases of Case C-60/00 *Carpenter* [2002] ECR I-6279, para 38; Case C-459/99 *MRAX* [2002] ECR I-6591, para 53; Case C-157/03 *Commission v Spain* [2005] ECR I-2911, para 26; Case C-503/03 *Commission v Spain* [2006] ECR I-1097 para 41; Case C-441/02 *Commission v Germany* [2006] ECR I-3449 para 109; and Case C-291/05 *Eind* [2007] ECR I-0000, para 44)

health and that ‘such a refusal will be based on an individual examination of the particular case’¹¹³² or where there has been an ‘abuse of rights or fraud, such as marriages of convenience’.¹¹³³ The issue here in terms of legal reasoning is that the CJEU is free to choose between incommensurable legal principles; legal rules do not determine the issues. So, where the Directive 2004/38 is silent on such issues, and the EU is acting on the edge of its competence such as in the areas of welfare and immigration, there is a need for the CJEU to include a subsidiarity and proportionality review. Furthermore, the CJEU should be explicit in its reasoning of how it had considered subsidiarity, weighed up the seriousness of the national measure at issue against the need to balance the interests of society with those of individuals and groups as well as demonstrating a respect for localism by giving more weight to the Member State’s right to regulate. Even where there is no change in case outcomes an explicit explanation of how the CJEU had considered subsidiarity in the CJEU’s reasoning would help to improve the quality of the reasoning of the CJEU and consequently enhance the legitimacy of the CJEU’s ruling.¹¹³⁴

With regard to the second question raised in the *Metock* case concerning whether the benefit of the provisions of Directive 2004/38 for third country national spouses of an EU citizen arise irrespective of when and where the marriage took place and of the circumstances in which she entered the host Member State, the CJEU stressed the importance of ensuring that national legislation was compatible with the objectives of the internal market.¹¹³⁵ In particular it stressed that ‘establishing an internal market implies that the conditions of entry and residence of a Union citizen in a Member State whose nationality he does not possess are the same in all the Member States.’ So, for example, it emphasised that Directive 2004/38 should not be interpreted restrictively so as to deprive the Directive of its effectiveness.¹¹³⁶ It also pointed out how there was no requirement in the

¹¹³² Case C-127/08, *Blaise Baheten Metock & Others v Minister for Justice, Equality and Law Reform (Metock & Others)*, 3 CKLR 39 (2008) para 74.

¹¹³³ *Ibid.*, para 75.

¹¹³⁴ N.Everling, ‘The ECJ as a Decision Making Authority’ (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.’

¹¹³⁵ *Ibid.*, para 84.

¹¹³⁶ *Ibid.*

Directive that a Union citizen must already have founded a family at the time when he moves to the host State in order for his third country family members to be able to enjoy the rights pursuant to Directive 2004/38. Secondly, that Directive 2004/38 did not contain any requirement as to where a Union citizen and a third country national should be married.¹¹³⁷

However, examination of the CJEU's ruling in this case also reveals that there is no explicit discussion of whether there is a minimum core of EU rights of an EU citizen that are sacrosanct that there is therefore no need to consider if there is any actual cross-border element. Rather the CJEU focuses in its reasoning on the importance of ensuring that the effectiveness of the Directive was not diminished by the existence and retention of the national legislation at issue in this case.¹¹³⁸ Subsidiarity would suggest that the issue of lawful entry should, at least have been subject to explicit competence discussion, rather than the standard approach of the effectiveness of the internal market. Furthermore, there is no discussion by the CJEU of whether there is a minimum core of EU rights for EU citizens that are sacrosanct and how balancing of such core rights with other competing rights and legitimate government objectives with reference to ECHR standards. Even where the CJEU is taking an expansionary approach that seems rights-based, it then introduces the idea of effectiveness of the internal market to support its conclusion, which is not a rights-based criterion, and rather it reflects an economic and political objective.

On the other hand, EU citizenship is unique in that it is additional to national citizenship and constrained by the limits of competence imposed by the Treaties themselves and subsidiarity and its inherent respect for localism in conjunction with the national identity clause. Clearly, the CJEU in such cases are faced with a conflict between autonomous concepts in the Charter and the ECHR and subsidiarity with subsidiarity working as a counter balance to this and subsidiarity favouring constitutional traditions of the Member States.

However, in *Metock*, despite this case involving shared competence areas as well as the sensitivity of defining of rights sharpening the subsidiarity concern, it is surprising that the CJEU paid little attention to subsidiarity in this ruling. This is particularly so where the Directive 2004/38 is silent on such issues and the EU is

¹¹³⁷ Ibid., paras 93 and 98-99.

¹¹³⁸ Ibid., para 84.

acting on the edge of its competence such as in the areas of welfare and immigration. Thus, it is submitted here that there is an even greater need for the CJEU to include a subsidiarity and proportionality review and to include discussion of this in its reasoning to help improve the quality of the reasoning of the CJEU and consequently enhance the legitimacy of the CJEU's ruling.¹¹³⁹

In particular, the CJEU should be explicit in its reasoning of how it had considered subsidiarity, weighed up the seriousness of the national measure at issue against the need to balance the interests of society with those of individuals and groups as well as demonstrating a respect for localism by giving more weight to the Member State's right to regulate. The CJEU needs to do this much more systematically. Such an approach would not only be respectful of the rule of law but would improve quality of decision making by the CJEU thus enhancing the legitimacy of the CJEU in the eyes of the national courts of the Member States.

Any such review should include considering firstly, what is the overall degree of competence that has been transferred to the EU in this context. This would include considering both the general and the specific competence and whether competence involves a consideration of the limits of shared competence in the internal market and the extent to which the EU is acting on the edge of its competence in relation to interfering with the Member States' laws in the context of national immigration law. In particular here the CJEU should contain an explicit discussion in its reasoning of how it had considered the effects of intrusion upon immigration competence, which remains with the Member States.

This should include discussion of any views from the national court what the potential impact might be on immigration for that particular Member State of giving third country national family members of EU citizens where the Directive 2004/38 is silent on such issues. This is particularly so where the EU is acting on the edge of its competence such as in the areas of welfare and immigration where there may be significant public policy and financial considerations.

¹¹³⁹ N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.'

Access to data or discussion that the national referring court had submitted about the public policy implications and cost could be helpful here in informing the CJEU's consideration of this issue.¹¹⁴⁰ Far-reaching effects into immigration of a Member State, for example, would suggest the CJEU is intruding upon immigration competence, which remains with the Member States.

Any views of the national court in this context and their reasons for favouring local law-making over centralised action should be explicitly stated. For, and as Kumm has pointed out, the advantages of local law-making over centralised action are three fold and encompass efficiency, democracy and preserving the identities of citizens of the Member State which is easier at a local level than a European level.¹¹⁴¹

But on the other hand, the CJEU would also need to demonstrate that it had considered whether the justice provisions in the Charter of Fundamental Rights had been respected by the national authorities when considering the extent to which the substance of the rights of a family member of an EU citizen had been so compromised. By explicitly including in its judgement such sector-specific criterion it had employed when weighing up such issues in this case and the weight given by the CJEU to each criterion, this would anchor subsidiarity. With this in mind, the next section turns to consider how although subsidiarity has been reaffirmed by the Treaty of Lisbon, there has also been a strengthening of residence rights attaching to EU citizens by the Treaty of Lisbon.

3.5 The reaffirming and strengthening of the residence rights attaching to EU citizens by the Treaty of Lisbon in light of the Charter of Fundamental Rights

Although EU citizenship has been accused of being symbolic and largely aspirational,¹¹⁴² recently there have been some developments to not only enhance the symbolism of citizenship by linking it to notions of justice and fundamental

¹¹⁴⁰ See also Rasmussen's conclusion that the CJEU needed to take into account more socio-economic data in its adjudication: H. Rasmussen, *On Law and Policy of the European Court of Justice*, (Kluwer 1986)]

¹¹⁴¹ Kumm Op Cit 581.

¹¹⁴² See for example J.d'Oliveira, 'Union Citizenship: Pie in the Sky?', in A.Rosas and E.Antola, (eds) *A citizens' Europe: In search of a New Order* (Sage, 1995).

rights but also to make EU citizenship ‘effective in practice’¹¹⁴³. Firstly, in 2009 the Treaty of Lisbon has reaffirmed and strengthened citizenship and the rights attaching to EU citizenship with Article 20 (2) providing that,

‘Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, *inter alia*:

- (a) The right to move and reside freely within the territory of the Member States
- (b) The right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;
- (c) The right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;
- (d) The right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.’

In respect of the new right to petition the European Parliament in Article 121(4) TEU and Article 24 (1) TFEU, these were two completely new articles introduced by the Treaty of Lisbon which the Preamble to the Treaty of Lisbon emphasises are aimed at enhancing democracy within the EU.

However, with regard to the reference to EU citizens rights *inter alia* in Article 20(2) and the insertion of *inter alia* does beg the question as to whether that means that the list of rights is limited to what is already in the Treaties or whether the list of rights is exhaustive. This is an important point of textual interpretation in determining the degree of legitimate flexibility of the CJEU in its case law in this context. For where the CJEU bases its interpretation on equality only, not on the text, this is very expansionary as the limits of equalisation are hard to draw: equality could extend to apply to all the benefits of Article 7 of Regulation 492/2011 to economically inactive citizens even though, and consistent with the

¹¹⁴³ This term was coined by the EC Commission in its Report, ‘Dismantling the obstacles to EU citizens rights’, COM (2010) 603 final at 3.

Preamble to Regulation 492/2011¹¹⁴⁴, the rules on employment and equality of treatment¹¹⁴⁵ and in respect of workers families¹¹⁴⁶ apply to those EU migrant citizens who are economically active.

In addition to this provision, there are also other key citizenship provisions currently located in Article 20 (1) and 21 TFEU and Article 11(4) TEU. Article 20(1) states that ‘citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship. As Shuibhne points out, ‘EU citizenship is now described as being ‘additional to’ national citizenship (under Article 17 EC, European citizenship was considered to ‘complement’ national citizenship).¹¹⁴⁷ The significance of such a change in wording is open to debate¹¹⁴⁸ but the use of the words ‘additional to’ suggests that EU citizenship is parallel to national citizenship rather than being complementary to national citizenship as previously i.e. it subtly seems to strengthen EU citizenship vis-à-vis national citizenship and which arguable could provide some support for the wide approach it adopts to the interpretation of the citizenship Treaty provisions where the CJEU has moved away from requiring a cross border element are the cases of *Rottman*,¹¹⁴⁹ *Zambrano*¹¹⁵⁰ and *Dereci*.¹¹⁵¹ For in these cases the CJEU considered the fundamental status of citizens but without elaborating when are the substance of rights compromised such that it does not need to consider any cross-border element. They will be discussed further in chapter 5 of this thesis.

In respect of Article 21(1), this states that ‘Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States,

¹¹⁴⁴ It states, ‘Freedom of movement for workers should be secured within the Union. The attainment of this objective entails the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment, as well as the right of such workers to move freely within the Union in order to pursue activities as employed persons subject to any limitations justified on grounds of public policy, public security or public health’.

¹¹⁴⁵ Article 7 - 9 Regulation 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union.

¹¹⁴⁶ *Ibid.*, at Article 10.

¹¹⁴⁷ See N.Shuibhne, ‘EU Citizenship after Lisbon’, in D.Ashiagbor, N.Countouris and I.Lianos, (eds) *The European Union after the Treaty of Lisbon*, (Cambridge University Press, 2012) at 139.

¹¹⁴⁸ *Ibid.*

¹¹⁴⁹ Case C-135/08, [2010] ECR I-1449 *Rottmann*.

¹¹⁵⁰ Case C-34/09 *Gerardo Ruiz Zambrano v Office Nationale de L’emploi (ONEM)* [CJEU, 08 March 2011].

¹¹⁵¹ Case C-256/11, *Dereci and others v Bundesministerium für Inneres*, [2011] ECR I-0000.

subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect'. The latter part of this article therefore confirms that EU citizenship is subject to the existing law of the EU. On the other hand, there is a new paragraph 3 to Article 21 which enables the Council, to act under the special legislative procedure and after consulting the European Parliament to 'adopt measures concerning social security or social protection'. As Shuibhne explains,

'it will be interesting to see if/how the Council realises this competence. It may seem like a door ajar to elements of harmonisation, but it may also give hope to states perceiving that the Court of Justice has unduly progressed the market value of free movement over national regulation of sensitive (and expensive) aspects of social policy'.¹¹⁵²

This is because it suggests any extension of social protection is for the legislature, and not for the CJEU.

Article 11(4) provides that,

'not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties'.

Article 24 TFEU then enables the Council and the European Parliament to adopt regulations to give effect to any such initiative.

Furthermore, and as Shuibhne points out, 'there is a stream of references in the revised TEU and TFEU that either enhances what we could term procedural citizenship rights or gives expression to the more human, people-focused dimension of EU objectives', the latter especially reflected in Article 2 TEU which provides in paragraph 1 that 'The Union's aim is to promote peace, its values and the well-being of its peoples'.¹¹⁵³ The inclusion of Article 6(2) TEU, which provides explicit competence for the EU's accession to the ECHR, demonstrates the EU's commitment to fundamental human rights for its peoples

¹¹⁵² See N.Shuibhne, 'EU Citizenship after Lisbon', in D.Ashiagbor, N.Countouris and I.Lianos, (eds) *The European Union after the Treaty of Lisbon*, (Cambridge University Press, 2012) at 141.

¹¹⁵³ *Ibid.*, at 143 for further discussion of examples.

in addition to the existing recognition by the CJEU of the ECHR and its case law as a source of inspiration for fundamental rights protection in EU law.¹¹⁵⁴ It also challenges the EU to accept an external standard, compared to the Court's previous largely discretionary references to the ECHR. This suggests that citizenship is more about human rights rather than judicial extension of economic rights.

Thirdly, following the Treaty of Lisbon, Article 6 TEU, gives legal force to the Charter of Fundamental Rights of the European Union of 7 December 2000.¹¹⁵⁵ The giving of legal effect to the Charter in EU law, more generally, has been regarded by Raucea as,

‘a major step forward in the promotion of fundamental rights within EU law, indeed a milestone also in the delicate architecture of European citizenship. Because of the Lisbon Treaty, the Charter of Fundamental Rights of the European Union has been granted with the same binding legal force as the Treaties, becoming a more visible catalogue of parameters that should be considered in testing the legal validity of the Union's legislative acts and policy actions.’¹¹⁵⁶

As the Preamble to the Charter explains, ‘conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity’, this Charter ‘places the individual at the heart of its activities, by establishing a citizenship of the Union and by creating an area of freedom, security and justice’. However, as Dickson has pointed out, it is difficult to ascertain precisely ‘what is the nature or ontological status of these common values and principles’.¹¹⁵⁷ Furthermore, she points out that the inclusion

¹¹⁵⁴ Article 6 (3) TEU and CJEU case law which has referred to the ECHR as a source of inspiration e.g. C-299/95 *Kremzow v Austria* [1997] ECR I-2629 para 14.

¹¹⁵⁵ The Charter of Fundamental Rights of the European Union, [2007] OJ C 303/1 and reissued with the Lisbon Treaty, [2010] OJ C83/2. E.Guild, ‘The European Union after the Treaty of Lisbon, fundamental rights and EU Citizenship’, Global Jean Monnet /EC Association world conference 25-26 May 2010 <http://ec.europa.eu/education/jean-monnet/doc/ecs10/guild_en.pdf>accessed 21.5.13. See also her comment that ‘Poland and the UK have opted for a limited national effect of the charter and the Czech Republic has been permitted to joint them in this limitation’

¹¹⁵⁶ C. Raucea, ‘Fundamental Rights: The Missing Pieces of European Citizenship?’, [2014] 14 (10) German Law Journal 2021-2040 at 2026.

¹¹⁵⁷ J.Dickson and P.Eleftheriadis, *The Philosophical Foundations of the European Union*, (OUP, 2012) at 192.

of rights in the Charter regarding human dignity¹¹⁵⁸ and respect for private and family life¹¹⁵⁹ ‘give rise to deeply moral questions concerning the meaning and import of such things’.¹¹⁶⁰ On the other hand, the inclusion of such rights in this particular Charter is unique in that the Charter has been created at a supranational rather than an international or national level and depends on a supranational court, the CJEU, rather than international (which have less impact on national legal systems) or national courts for its interpretation but will have effect at a national level as well as a supranational level.¹¹⁶¹

The Charter itself consists of seven chapters,¹¹⁶² each chapter containing a set of rights that EU citizens are entitled to. In respect of the scope of the rights in the Charter, this is much wider than the rights contained in the European Convention on Human Rights. These rights, Guild explains, come from two sources:

‘first rights, which already existed in EU law, such as for citizens of the Union and the right of free movement (Article 45); secondly, the European Convention on Human Rights (and its protocols). Here the Charter specifically states that in so far as it contains rights that correspond to those in the ECHR, the meaning and scope of the Charter rights shall be the same as those of the ECHR rights’.¹¹⁶³

As this means that there will be two concurrent systems of protection for fundamental rights in Europe Guild points out that on account of the inclusion of an Article 52(3) that, ‘this provision expressly does not prevent Union law providing more extensive protection. So, for example, this means, for instance, that the ambit of Article of the Charter, the right to respect for private and family life must extend at least as far as the European Court of Human Rights judgement

¹¹⁵⁸ Article 1 of the Charter of Fundamental Rights [2007] OJ C 303/1 and reissued with the Lisbon Treaty, [2010] OJ C83/2.

¹¹⁵⁹ Ibid at Article 33.

¹¹⁶⁰ J.Dickson and P.Eleftheriadis, *The Philosophical Foundations of the European Union*, (OUP, 2012) at 192.

¹¹⁶¹ See E.Guild, ‘The European Union after the Treaty of Lisbon, fundamental rights and EU Citizenship’, Global Jean Monnet /EC Association world conference 25-26 May 2010 <http://ec.europa.eu/education/jean-monnet/doc/ecsa10/guild_en.pdf>accessed 21.5.13. at 6-7 and also for a discussion of how ‘what the Charter reveals in the wider picture of the transformation that is the EU is a desegregation of the elements of the Weberian state. Instead people are entitled to rights that emanate from multiple sources and which are enforced through a variety of mechanisms, now most importantly for this discussion, the charter of Fundamental Rights.’

¹¹⁶² The chapters are (i) dignity, (ii) Freedoms, (iii) Equality, (iv) solidarity, (v) Citizens Rights, (vi) Justice, (vii) General Provisions.

¹¹⁶³ Guild Op.Cit.

in *Gillan and Quintan v UK*'.¹¹⁶⁴ As the European Court of Human Rights ruled in paragraph 61,

‘As the Court has had previous occasion to remark, the concept of “private life” is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. The notion of personal autonomy is an important principle underlying the interpretation of its guarantees. The Article also protects a right to identity and personal development, and the right to establish relationships with other human beings and the outside world. It may include activities of a professional or business nature. There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of “private life”. There are a number of elements relevant to a consideration of whether a person's private life is concerned in measures affected outside a person's home or private premises. In this connection, a person's reasonable expectations as to privacy may be a significant, though not necessarily conclusive, factor, where the applicant was subjected to a forced search of her bag by border guards, the Court held that “any search effected by the authorities on a person interferes with his or her private life”.’¹¹⁶⁵

The broader Charter context could also have been taken into account in the cases considered earlier of *Metock*¹¹⁶⁶ and *Akrich*¹¹⁶⁷. This would have affected the balance of reasoning in both those cases. For in addition to considering the importance of ensuring national legislation was compatible with the objectives of the internal market there would also need to be a consideration of the minimum core of EU citizenship rights in relation to Article 8 of the Charter that are so sacrosanct that there is no need to consider whether a cross border element was present.

Clearly such a Bill of Rights for European citizens is also going to provide fertile ground for judicial consideration of EU citizens rights in a wide variety of other

¹¹⁶⁴ Guild Op.Cit. at 4 citing *Gillan and Quintan v UK* no [4158/05](#) [2010] ECHR 28 (12 January 2010) para 61.

¹¹⁶⁵ The European Court of Human Rights in *Gillan and Quintan v UK* no [4158/05](#) [2010] ECHR 28 (12 January 2010) para 61.

¹¹⁶⁶ Case C-109/01, *Akrich*, [2003] ECR I-9607.

¹¹⁶⁷ Case C-127/08, *Blaise Baheten Metock & Others v Minister for Justice, Equality and Law Reform (Metock & Others)*, 3 CKLR 39 (2008).

contexts¹¹⁶⁸ although to date there has been a rather limited use of the Charter by the CJEU¹¹⁶⁹ to justify its interpretation of the scope of the citizenship Treaty provisions. This will be considered further in chapter 5 in the context of the CJEU and the determination of the residency rights of non-economically active citizens.

Furthermore, in light of the impending accession of the EU to the ECHR, there is the possibility of overlap between them. The possibility for interaction between the EU Charter and the ECHR and the use of the ECHR as a guide to the interpretation of the Charter is anticipated firstly in the inclusion of Article 6(1) which provides that the ‘rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the Explanations referred to in the Charter, that set out the sources of those provisions’. Secondly, examination of the explanations that accompany the Charter reveal many references to ECHR standards when explaining the substance of the rights of the Charter and at the end of the Explanations, 12 provisions are listed as corresponding with the ECHR. On the other hand, demonstrating a respect for subsidiarity and the limits of the EU’s competence, there is a clear warning in Article 6(1) that ‘the provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties’. Such a clear warning has the potential to place limits on the extent to which the CJEU is able to expansively interpret the scope of EU citizenship and the Charter of Fundamental Rights where the competence of the Union is restricted.

Thus this section has explained how following the Treaty of Lisbon there have been various developments to not only enhance the symbolism of competence by linking it to the notion of justice and fundamental rights but also to make European citizenship more effective in practice. The next section turns to consider how despite the attempts by the CJEU to enhance citizenship rights to non-economically active citizens, there has been a failure by the CJEU to undertake a

¹¹⁶⁸ See M.Dougan, ‘The Treaty of Lisbon 2007: Winning Minds, Not Hearts’, (2008) 45 Common Market Law Review 617-703 at 664 for a general discussion of how the Charter might impact on the implementation of EU law and a discussion of how the CJEU might treat the Charter when interpreting EU law.

¹¹⁶⁹ For further discussion see P.Craig, ‘The Charter, the CJEU and National Courts’, in D.Ashiagbor, N.Countouris and I.Lianos, (eds) *The European Union after the Treaty of Lisbon*, (Cambridge University Press, 2012) at 78.

subsidiarity review when determining the residency rights of EU citizens following the Treaty of Lisbon.

4. The failure of the CJEU to undertake a subsidiarity review when determining the residency rights of EU citizens following the Treaty of Lisbon

Perhaps the practically most far-reaching move to enhance EU citizenship¹¹⁷⁰ has come from the CJEU post 2009 in considering non-economically active citizens and third country national family members in relation to residence rights. For, the CJEU, by adopting a dynamic and radical interpretation of the citizenship Treaty provisions,¹¹⁷¹ it has shifted the emphasis of citizenship from a market focus involving a cross-border element towards a more rights based approach in three key cases with no attempt to identify the limits to competences through subsidiarity analysis. This is of particular concern in cases where the CJEU has moved away from requiring a cross border element: *Rottman*,¹¹⁷² *Zambrano*¹¹⁷³ and *Dereci*.¹¹⁷⁴ For in these cases the CJEU considered the fundamental status of citizens but without elaborating when are the substance of rights compromised such that it does not need to consider any cross-border element.

Furthermore, despite these cases concerning shared policy areas, the CJEU failed to undertake any subsidiarity and proportionality review applied to competences. This is surprising as the shift in emphasis in the CJEU's case law in conjunction with the Citizenship articles and the Charter of Fundamental Rights post the Treaty of Lisbon, while they may seem rhetorically attractive, however, have the potential to lead the CJEU into controversial territory with the Member States. This is particularly so in cases involving policy areas where the EU is on the edge of its competence and in light of the reaffirmation in the Treaty of Lisbon of

¹¹⁷⁰ See also the moves by the European Commission not only to raise awareness of citizenship rights but also proposing actions to improve the daily life of citizens, as most recently evidenced by the 2013 European Year of the Citizen initiatives < <http://europa.eu/citizens-2013/en> > accessed 3.1.13.

¹¹⁷¹ See D.Kochenov, 'EU citizenship: from an incipient form to an incipient substance? The discovery of the treaty text', (2010) 37 (4) European Law Review 369.

¹¹⁷² Case C-135/08, [2010] ECR I-1449 *Rottmann*.

¹¹⁷³ Case C-34/09 *Gerardo Ruiz Zambrano v Office Nationale de L'emploi (ONEM)* [CJEU, 08 March 2011].

¹¹⁷⁴ Case C-256/11, *Dereci and others v Bundesministerium für Inneres*, [2011] ECR I-0000.

subsidiarity and its inherent respect for localism especially when considering the residence rights of non-economically active EU citizens.

It also raises two questions. Firstly how could the CJEU operationalise a subsidiarity and proportionality review applied to competences in this context. Secondly, with reference to the Charter of Fundamental Rights whether it is possible to identify a minimum core of EU rights for all EU citizens that are so sacrosanct that they need to be preserved for EU migrant citizens too irrespective of the cross-border requirements and how this impacts upon the division of competence between the EU and the Member States. Using the cases of *Rottman*,¹¹⁷⁵ *Zambrano*¹¹⁷⁶ and *Dereci*¹¹⁷⁷ as case examples, the next chapter will consider these questions further and in particular how the CJEU could consider the limits of EU competences through subsidiarity analysis in this particular context. This would help to improve the quality of the reasoning of the CJEU and consequently enhance the legitimacy of the CJEU's ruling.¹¹⁷⁸

5. Conclusion

This chapter has explained how, following the Treaty of Lisbon, the residence rights attaching to EU citizenship have been reaffirmed and strengthened. Secondly, how there have been some developments following the Treaty of Lisbon to not only enhance the symbolism of EU citizenship by linking to justice and fundamental rights but also to make EU citizenship more effective in practice. Finally, there was a critical discussion of the post Treaty of Lisbon case law in relation to non-economically active citizens in relation to residence rights of citizens. In particular, it was pointed out how the shift in emphasis in the CJEU's case law in conjunction with the Citizenship articles and the Charter of Fundamental Rights post the Treaty of Lisbon, while they may seem rhetorically attractive; however, have the potential to lead the CJEU into controversial territory with the Member States. This is particularly so in cases involving policy

¹¹⁷⁵ Case C-135/08, [2010] ECR I-1449 *Rottmann*.

¹¹⁷⁶ Case C-34/09 *Gerardo Ruiz Zambrano v Office Nationale de L'emploi (ONEM)* [CJEU, 08 March 2011].

¹¹⁷⁷ Case C-256/11, *Dereci and others v Bundesministerium für Inneres*, [2011] ECR I-0000.

¹¹⁷⁸ N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.'

areas where the EU is acting in shared competence areas or on the edge of its competence and in light of the reaffirmation in the Treaty of Lisbon of subsidiarity and its inherent respect for localism. For examination of the case law on the CJEU on residency rights of EU citizenship in the next chapter will reveal how the CJEU's incremental and piecemeal approach with no real reference to subsidiarity and a respect for localism has allowed the CJEU to extend EU competence in this context. Furthermore, the CJEU has failed to identify a minimum core of EU rights for all EU citizens that are so sacrosanct that they need to be preserved for EU migrant citizens too irrespective of the cross-border requirements and how this impacts upon the division of competence between the EU and the Member States.

With this in mind, the next chapter forms a case study which illustrates the theoretical framework in this thesis by proposing a normative argument of how a subsidiarity and proportionality review applied to competences could be anchored by the CJEU when determining the residency rights of EU citizens who are non-economically active with particular reference to the cases of *Rottman*,¹¹⁷⁹ *Zambrano*¹¹⁸⁰ and *Dereci*.¹¹⁸¹

¹¹⁷⁹ Case C-135/08, [2010] ECR I-1449 *Rottmann*.

¹¹⁸⁰ Case C-34/09 *Gerardo Ruiz Zambrano v Office Nationale de L'emploi (ONEM)* [CJEU, 08 March 2011].

¹¹⁸¹ Case C-256/11, *Dereci and others v Bundesministerium für Inneres*, [2011] ECR I-0000.

Chapter 5

The anchoring of a subsidiarity and proportionality review by the CJEU when determining the residency rights of EU citizens following the Treaty of Lisbon

1.Introduction

2.The shift in the case law of the CJEU from discrimination to the fundamental status of Citizenship

3.Could a subsidiarity and proportionality review be helpful here and, if so, what criteria should such a review involve?

4.How should the CJEU more meaningfully engage with subsidiarity in its judicial reasoning

5.Conclusion

1.Introduction

CJEU cases involving the rights of EU citizens who are economically inactive¹¹⁸² frequently involve sensitive immigration issues on the borderline of EU competences.¹¹⁸³ Such EU citizenship cases, such as the case of *Zambrano*¹¹⁸⁴ considered in both chapter 4 and in section 2 of this chapter, can also have subsequent relevance for national cases involving immigration issues.¹¹⁸⁵ Despite this, the CJEU has paid little attention to subsidiarity and proportionality applied to the clear delineation of competences or to demonstrate much respect for local immigration laws in citizenship cases concerning the rights of EU citizens who are economically inactive.¹¹⁸⁶ It was therefore argued in the previous chapter that

¹¹⁸² See for example Case C-85/96, *Martinez Sala v Freistaat Bayern*, [1998] ECR I-2691

¹¹⁸³ See Chapter 4 and 5 for further discussion.

¹¹⁸⁴ Case C-34/09, *Gerardo Ruiz Zambrano v Office Nationale de L'emploi*, (ONEM) 8 March 2011.

¹¹⁸⁵ As evidenced recently in the UK in the case of *Sanneh & Ors v Secretary of State for Work and Pensions and Others*, [2015] EWCA Civ 49.

¹¹⁸⁶ See for example Case C-85/96, *Martinez Sala v Freistaat Bayern*, [1998] ECR I-2691

if the CJEU were to undertake a subsidiarity and proportionality review which involved a consideration of the limits and scope of EU competence in a particular shared competence area especially where sensitive immigration issues on the border line of EU competences are concerned, this would demonstrate its adherence to the rule of law,¹¹⁸⁷ the latter being enshrined in Article 2 TEU.¹¹⁸⁸ Adhering to the rule of law is an important issue for the CJEU to demonstrate its respect for a core value commonly associated with democracy¹¹⁸⁹ and with the validity of law itself.¹¹⁹⁰

A subsidiarity review undertaken by the CJEU involving the CJEU checking whether the Union has competence to act (conferral) and in cases concerning areas of shared competence would help to improve the quality of the reasoning of the CJEU and consequently enhance the legitimacy of the CJEU's ruling even where there is no change in case outcomes.¹¹⁹¹ This is consistent with the EU's overarching aim to have democratic, transparent and efficient institutions through the adherence to values commonly associated with democracy¹¹⁹² and the problem of ultra vires EU action lacking legitimacy in the Member States eyes.¹¹⁹³

On the other hand, it also was explained how there are also difficult questions as to the intensity of any proportionality review in EU migrant citizen residency cases where EU migrant citizens are unable to support themselves.¹¹⁹⁴ Such

¹¹⁸⁷ For further discussion see B.Tamanaha, *On the Rule of Law: History, Politics, Theory*, (Cambridge University Press, 2004).

¹¹⁸⁸ See also K.Lenaerts, 'Upholding Union Values in Times of Societal change: the Role of the Court of Justice of the European Union'. <https://www.dur.ac.uk/resources/deli/events/annual%20lecture%202014/Lenaerts_2014_Durham.pdf>accessed 1.7.14.

¹¹⁸⁹ For further discussion see B.Tamanaha, *On the Rule of Law: History, Politics, Theory*, (Cambridge University Press, 2004).

¹¹⁹⁰ See further L.Fuller, *Inner Morality of Law*, (New Haven, London: Yale University Press, 1964).

¹¹⁹¹ N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.'

¹¹⁹² Laeken Declaration <http://europa.eu/rapid/press-release_PRES-01-902_en.htm> accessed 4.7.14.

¹¹⁹³ *Brunner v The European Union Treaty* [1994] 1 CMLR 57.

¹¹⁹⁴ Relatedly it has also led to complaints of social tourism by the UK as evidenced in the Telegraph 7.10.13 <<http://www.telegraph.co.uk/news/worldnews/europe/eu/10361971/Britain-admits-it-has-no-figures-on-EU-welfare-tourist-numbers.html>> accessed 14.2.15 as well as criticism by the EU of the UK for such views e.g. 'Migration plan risks UK being seen as nasty country, The Guardian, 27 November 2013 <<http://www.theguardian.com/uk-news/2013/nov/27/migration-uk-nasty-country-eu-commissioner>>accessed 14.2.15. On the other hand, for a factual analysis into the impact of EU economically inactive migrants on national welfare and healthcare budgets of the Member States by the European Commission see the

difficult questions involve not only the level of deference that the CJEU should articulate in its reasoning but also what role the Charter of Fundamental Rights should play in both contexts and the possible overlapping role of the ECHR especially as ‘any ECHR decisions will be binding on the Union as a matter of international law’.¹¹⁹⁵ Furthermore, as the EU can only have responsibility for its actions on the basis of a valid competence to carry them out, under the rules of attribution of responsibility in international law, which the European Court of Human Rights applies,¹¹⁹⁶ there could be challenges to the Court’s autonomy to interpret EU law in that the ‘The European Court of Human Rights (ECtHR) might attribute responsibility to and apportion it between the EU and its Member States.’¹¹⁹⁷ This is particularly problematic here argues Eckes in light of ‘the complex and dynamic task division between the EU and its Member States [which] could lead the ECtHR to offer an interpretation of substantive EU law binding on the Court of Justice’.¹¹⁹⁸ The particular challenges she cites are firstly the unique way in which EU law is often implemented at a national level by the Member States with a degree of discretion as to the means of implementation of

European Commission, A fact finding analysis on the impact on the Member States' social security systems of the entitlements of non-active intra-EU migrants to special non-contributory cash benefits and healthcare granted on the basis of residence, Final report submitted by ICF GHK in association with Milieu Ltd, Brussels, DG Employment, Social Affairs and Inclusion 14 October 2013 (revised on 16 December 2013) which concludes at ii that ‘Overall, it can be concluded that the share of non-active intra-EU migrants is very small, they account for a similarly limited share of SNCB recipients and the budgetary impact of such claims on national welfare budgets is very low. The same is true for costs associated with the take-up of healthcare by this group. Employment remains the key driver for intra-EU migration and activity rates among such migrants have indeed increased over the last 7 years’.

¹¹⁹⁵ C. Eckes, ‘One Step Closer: EU Accession to the ECHR ‘ Const. L. Blog (2nd May 2013) (available at <<http://ukconstitutionallaw.org>> last accessed 14.2.15).

¹¹⁹⁶ International Law Commission, *Draft articles on the law of Treaties between States and International Organisations or between international organisations with commentaries*, (1982). For<http://legal.un.org/ilc/texts/instruments/english/commentaries/1_2_1982.pdf> last accessed 29.1.14. See also the case of *Loizidou v Turkey*, (1995) ECHR 10. See also most recently the CJEU’s opinion 2/13 Opinion 1/13 8.12.14 <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=160882&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=40247>> accessed 8.1.15 regarding the EU’s accession to the European Convention on Human Rights where the CJEU has emphasised the need to preserve the autonomy of EU law when considering human rights protection.

¹¹⁹⁷ C. Eckes, ‘One Step Closer: EU Accession to the ECHR ‘ Const. L. Blog (2nd May 2013) (available at <<http://ukconstitutionallaw.org>> last accessed 14.2.15).

¹¹⁹⁸ Ibid.

Directives in order to be directly effective.¹¹⁹⁹ Secondly, the relationship that exists between the courts of the Member States and the CJEU through the preliminary reference system whereby the CJEU depends not only on the national courts to refer questions to it but also upon the national court to give effect to the CJEU's preliminary ruling when ultimately deciding a particular case.¹²⁰⁰ This she concludes 'boils down to the question of how integrated and irreversibly interlocked the EU and national legal orders and judicial systems really are in the face of an external challenge, such as confirmation by a well-respected external judicial authority that the EU breaches human rights. Will such a finding of the ECtHR flare up resistance towards EU law by national courts or public opinion?'¹²⁰¹ Such tensions have a particular resonance when one considers the determination of the residency rights of EU migrant citizens and especially in relation to the intensity of any proportionality review in EU residency cases where EU migrant citizens are unable to support themselves. These are very politically charged questions as evidenced recently following the accession of new Member States of Bulgaria and Romania where transitional arrangements, laid down in the Accession Treaties of those new Member States,¹²⁰² permitted Member States to restrict the free movement of persons from those acceding countries for a specified period, came to an end.¹²⁰³ Such difficult questions also involve not only the level of deference that the CJEU should articulate in its reasoning but also what role the Charter of Fundamental Rights should play in both contexts and the possible overlapping role of the ECHR especially as 'any ECHR decisions will be binding on the Union as a matter of international law'.¹²⁰⁴

¹¹⁹⁹ Ibid.

¹²⁰⁰ Ibid.

¹²⁰¹ Ibid.

¹²⁰² Annexes VI and VII to the Accession Treaty, between the Kingdom of Belgium, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern

Ireland (Member States of the European Union) and the Republic of Bulgaria and Romania concerning the accession of the Republic of Bulgaria and Romania to the European Union, Official Journal of the European Union, vol 48, 21 June 2005.

¹²⁰³ A. Travis and S. Malik, 'European watchdog accuses Britain of shameful rhetoric on migrants', 29 March 2013 the Guardian at <http://www.theguardian.com/uk/2013/mar/29/eu-watchdog-britain-shameful-rhetoric-migrants> accessed 23.9.14.

¹²⁰⁴ C. Eckes, 'One Step Closer: EU Accession to the ECHR' Const. L. Blog (2nd May 2013) (available at <<http://ukconstitutionallaw.org>> last accessed 14.2.15). See also the recent CJEU's

The purpose of this chapter is to consider how a subsidiarity and proportionality review applied to competences, and the criteria that the CJEU should take into account when balancing competing interests, would enable the CJEU to anchor subsidiarity when determining the residency rights of non-economically active EU citizens. Such discussion has particular reference to the case of *Zambrano*¹²⁰⁵ where the CJEU dispensed with the need for a cross border element and ruled that, ‘Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union.’¹²⁰⁶ Furthermore, the CJEU in this case failed to explain why EU citizenship should be allowed to take priority over national citizenship or to flesh out what the substance of those rights should be. On the other hand, more recent case law, the CJEU has adopted a stricter approach. For example, when considering whether there has been a cross border element in the case of *Dereci* the CJEU focused more heavily on the cross border element requirement when it ruled in para 54 that ‘a Union citizen who has never exercised his right of freedom of movement and has always resided in a Member State of all which he is a national is not covered by the concept of beneficiary for the purposes of that provision without elaborating the meaning of what constitutes ‘the genuine enjoyment of the rights conferred by virtue of his status as a Union citizen’.¹²⁰⁷ This case will be considered further in section 2.¹²⁰⁸

opinion 2/13 Opinion 1/13 8.12.14
 <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=160882&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=40247>> accessed 8.1.15 regarding the EU’s accession to the European Convention on Human Rights where the CJEU has emphasised the need to preserve the autonomy of EU law when considering human rights protection.

¹²⁰⁵ Case C-34/09 *Gerardo Ruiz Zambrano v Office Nationale de L’emploi (ONEM)* [CJEU, 08 March 2011].

¹²⁰⁶ Case C-34/09 *Gerardo Ruiz Zambrano v Office Nationale de L’emploi (ONEM)* [CJEU, 08 March 2011] para 42. Subsequent cases of Case C-434/09 *McCarthy v Home Secretary* [2011] ECR I-0000 Case C-434/09 *McCarthy v Home Secretary* [2011] ECR I-0000 and Case C-256/11, *Dereci and others v Bundesministerium fur Inneres*, discussed further in section 2 of this chapter, have resurrected the cross border rule through adopting a more restrictive approach to the interpretation of the invocation of the citizenship provisions in purely internal situations.

¹²⁰⁷ For the most recent examples of the CJEU adopting a stricter approach towards EU migrant citizens who are economically inactive in cases in relation to the interpretation of Directive 2004/38 in particular see Case C-87/12, *Kreshnik Ymeraga and Others v Ministre du Travail, de l’Emploi et de l’Immigration* para 33 where the CJEU ruled that ‘It follows that Directives 2003/86 and 2004/38 are not applicable to third-country nationals who apply for the right of residence in order to join a family member who is a Union citizen and has never exercised his right of freedom of movement as a Union citizen, always having resided as such in the Member State of which he holds the nationality’; Case C-333/13, *Elisabeta Dano v Jobcenter Leipzig*, where the

The adoption of a subsidiarity and proportionality review applied to competences would, however, enable the CJEU to flesh out what are sacrosanct rights for EU citizens that should be respected and protected in light of the Charter of Fundamental Rights. For, on the one hand, the question of residence rights for non-economically active EU citizens raises difficult and topical issues relating to the cost of a Member State supporting EU migrants who have no means of support and who are a burden on the Member States welfare system.¹²⁰⁹ However, on the other hand, in cases involving the determination of EU citizens' residency rights and the distinction drawn between economically active and non-economically active EU citizens this has led to what O'Brien has termed 'a perforated personhood patchwork'¹²¹⁰ where 'gaps in this patchwork can tip non-nationals into destitution, suggesting a fairly loose commitment to social protection and social justice for non-nationals'.¹²¹¹ There are also wide differences in approaches to a safety net of social protection¹²¹² and difficult questions as to who should bear the cost of social protection and social welfare

CJEU held in para 76 that 'Article 7(1)(b) of Directive 2004/38 seeks to prevent economically inactive Union citizens from using the host Member State's welfare system to fund their means of subsistence'.

¹²⁰⁸ Case C-256/11 *Dereci and others v Bundesministerium für Inneres*, [2011] ECR I-0000.

¹²⁰⁹ See for example The Guardian, 29.7.14 outlining a proposal that EU migrants to Britain will only be able to claim welfare for three months under plans designed to head off criticism of immigration failures. See also the CJEU case of C-333/13 *Elisabeta Dano v Jobcenter Leipzig* where the CJEU ruled that economically inactive EU citizens who go to another Member State solely to obtain social assistance may be excluded from certain social benefits.

¹²¹⁰ C. O'Brien, 'I Trade, therefore I am: Legal Personhood in the European Union', (2013) 50 *Common Market Law Review* 1643-1684 at 1649.

¹²¹¹ *Ibid* at 1660.

¹²¹² See The Telegraph, Benefits in Europe: country by country which details the benefits a 30-year-old EU migrant could access in each member state < <http://www.telegraph.co.uk/news/worldnews/europe/10391238/Benefits-in-Europe-country-by-country.html> >accessed 21.9.14. See also Council of the EU, *Social Dimension of the EU – Adequate protection for long-term care needs in an aging society report* (Brussels, 2014) and who highlight how differences between Member States in respect of long term care for the elderly is especially pronounced <http://ec.europa.eu/health/ageing/docs/ev_20140618_co04_en.pdf>accessed 21.9.14 and the European Centre for the Development of Vocational Training, *Socially responsible restructuring: effective strategies for supporting redundant workers*, (Luxembourg, 2010) <http://www.cedefop.europa.eu/EN/Files/6107_en.pdf>accessed 21.9.14 and who point out how 'across the oldest Member States (EU-15) there seems to be a common recognition that socially responsible practice requires some 'safety net' of support for employees to be made redundant or who are at risk of redundancy. However, there are considerable contrasts in what the expectations and provisions are for safety nets even where, for example, employment protection or stability legislation exist. While this may include codified periods of redundancy notification, a defined statutory entitlement to retraining, referral guarantees (to labour employment offices, for example), or legislative entitlement to 'buffer' periods for work adjustment and job search, the scope and content of these varies, often greatly, between countries. However, there is also no common view across Member States of what role career guidance should play within safety nets'.

tourism. However, such an approach by the CJEU O'Brien further argues risks accusations that it genders economic mobility in that non-economically active EU citizens who are carers for children, the elderly or disabled are unable to claim the same rights as economically active EU citizens.¹²¹³ In addition, following the case of *Zambrano* in particular, the CJEU has also drawn a distinction between economically inactive EU citizens who are adults and an economically inactive EU citizen who is a child of a third country national. It has also enabled a third country national family member of an EU citizen to rely on EU law where there was no cross-border element.¹²¹⁴

With this latter case in mind and in order to contextualise this discussion, the chapter commences with how the CJEU when considering travel and residence rights of citizens in *Zambrano* as well as other various key cases have moved away from a focus on eliminating discrimination and requiring a cross-border element to an emphasis on the fundamental status of citizenship (*Zambrano*¹²¹⁵). This will also highlight firstly in *Zambrano* how despite the emphasis on the fundamental status of EU citizenship and the existence of the Charter, which is extolled as a holy grail of EU citizens rights,¹²¹⁶ there was no reference by the CJEU to the Article 33 right to reconciliation of work and family life in the Charter or Article 7 and the right to respect for private and family life or, where EU citizens are children, was there any discussion of the UN Convention on the Rights of the Child.¹²¹⁷ The normative weight of these different and potentially competing considerations is not made clear. Secondly, despite the obvious conflict between the fundamental status of EU citizenship and the difficulties for the CJEU of straying into the realms of the Member States' legal and policy decision

¹²¹³ C. O'Brien, 'I Trade, therefore I am: Legal Personhood in the European Union', (2013) 50 Common Market Law Review 1643-1684. See also her discussion at 1665 that 'pregnancy and maternity do not feature in Article 7(3) of Directive 2004/38 as a permitted temporary break during which worker status may be retained.'

¹²¹⁴ Case C-34/09 *Gerardo Ruiz Zambrano v Office Nationale de L'emploi (ONEM)* [CJEU, 08 March 2011].

¹²¹⁵ Case C-34/09 *Gerardo Ruiz Zambrano v Office Nationale de L'emploi (ONEM)* [CJEU, 08 March 2011].

¹²¹⁶ See for example Vice-President Viviane Reding, the EU's Commissioner for Justice, Fundamental Rights and Citizenship and who writes, 'I am glad to see the Charter is now fully alive serving as a real safety net for our citizens and as a compass for EU institutions, Member States and courts alike. I could imagine that one day citizens in the Member States will be able to rely directly on the Charter – without the need for a clear link to EU law. The Charter should be Europe's very own Bill of Rights.' <http://europa.eu/rapid/press-release_IP-14-422_en.htm>accessed 31.7.14.

¹²¹⁷ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, <<http://www.refworld.org/docid/3ae6b38f0.html>>accessed 15 July

making particularly where there is no cross border element, there was little debate by the CJEU in the cases selected as to when are the substance of rights compromised such that it does not need to consider any actual cross-border element. The CJEU, demonstrating a pro-union interpretative tendency, introduced the shift without explicitly justifying an extension of EU competence. Nor was there any discussion of the minimum core of rights that needs to be preserved irrespective of the linking factors. Thirdly, following on from the normative considerations in chapter 4 and in particular where it was pointed out how despite the reaffirmation of subsidiarity following the Treaty of Lisbon how the CJEU has failed to undertake any subsidiarity review in shared policy cases concerning the determination of residency rights of EU citizens, this chapter adopts a normative approach and includes a discussion of how the CJEU could apply a subsidiarity and proportionality review in this context with particular reference to three particular cases: *Zambrano*¹²¹⁸, *Dereci*¹²¹⁹ and *MacCarthy*¹²²⁰.

The reason for the choice of such cases is that they involve contentious issues for the CJEU when performing judicial review. Firstly, as EU law in this context is an area of shared competence between the EU and the Member States this leads to difficult questions for the CJEU as to where the balance is to be drawn in cases concerning EU citizens' residency rights where those EU citizens are economically inactive in light of the Charter of Fundamental Rights. This inevitably requires the CJEU strike a balance between competing political and economic interests and which can be especially difficult when the CJEU is required to consider the residency rights of EU citizens who are economically inactive where they are, for example, children in light of Article 24 of the Charter of Fundamental Rights¹²²¹ and the UN Convention on the Rights of the Child.¹²²²

¹²¹⁸ C-34/09 *Gerardo Ruiz Zambrano v Office National de L'Emploi* (ONEM), [2011] ECR I-1177.

¹²¹⁹ Case C-256/11 *Dereci and others v Bundesministerium für Inneres*, [2011] ECR I-0000

¹²²⁰ Case C-434/09 *McCarthy v Home Secretary* [2011] ECR I-0000.

¹²²¹ This provides that '1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration'.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his and her parents, unless that is contrary to his or her interests.

Here there is a spill over with areas of national competence where the EU has only a complementary role such as social protection of children.

However, the aim of Article 24 has been proclaimed ‘to protect children’s’ core interests - specifically their right to care and protection, their right to express their views freely, and to maintain a regular relationship with both their parents. Recognition of children’s rights at the EU level follows the recognition given at the international level by the 1989 UN Convention on the Rights of the Child’.¹²²³ The latter Convention has not been ratified by the EU although most member States have. Consequently although it is not legally binding on the EU ‘the CJEU enjoys a strong normative influence on its 47 States, given that the Court’s judgements are legally binding in these states’.¹²²⁴

Secondly, drawing upon an argument by Craig that ‘proportionality should be used as a general principle of judicial review that can be used both in cases concerned with rights and in non-rights based cases, albeit with varying intensity of review’,¹²²⁵ there are also difficult questions as to the intensity of any proportionality review in this context. For example, should the CJEU articulate in its reasoning when undertaking a subsidiarity and proportionality review a higher level of deference to the national judgements in cases involving EU migrant citizens who are economically inactive? Furthermore, what role should the Charter of Fundamental Rights play when determining the ‘sacrosanct’ or a non-derogable core of rights¹²²⁶ of EU citizens in situations that fall within EU law

¹²²² UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, <<http://www.refworld.org/docid/3ae6b38f0.html>>accessed 15 July. 2014. See also H.Morgan and H.Stalford, ‘Disabled people and the EU: equal citizens?’, chapter 7 adapted from C.Barnes and G.Mercer (eds.), *The Social Model of Disability and Europe and the Majority world* (Leeds Disability Press, 2005) for a discussion of the difficulties facing other EU citizens when they are economically inactive and disabled and Article 26 of the Charter of Fundamental Rights which provides that ‘The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community’.

¹²²³ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, <<http://www.refworld.org/docid/3ae6b38f0.html>>accessed 15 July

¹²²⁴ T.Koivurova in ‘Jurisdiction of the ECHR regarding Indigenous peoples: Retrospects and Prospects’ in M.Fitzmarice and P.Merkouris, (eds), *The Interpretation and Application of the ECHR, Legal and Practical Implications*, (Martinus Nyhoff Publishers, 2013).

¹²²⁵ P.Craig, ‘Proportionality, Rationality and Review’, (2011) *Oxford Legal Studies Research Paper No. 5/2011*.

¹²²⁶ See further The European Commission for Democracy Through law, Report ‘Are there differentiations Among Human Rights: Jus Cogens, Core Human Rights, Obligations Erga Omnes and Non-Derogability?’, <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-UD\(2005\)020rep-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-UD(2005)020rep-e)>accessed 21.9.14 at 14 -15 which looks to the core human rights texts, the United Nations

when undertaking a subsidiarity and proportionality review and what are the specific criteria that it should take into account when striking the balance in such cases?

Thirdly, there are questions as to how to achieve a structured approach to a proportionality review here. There has already been some debate concerning proportionality or rationality as the preferred test for judicial review.¹²²⁷ In respect of the latter, at national level, Elliott has argued that to achieve a structured approach when reviewing the exercise of governmental authority the court should focus on two distinct questions. Firstly,

‘to determine what should constitute the operative standard of justification in the particular circumstances of the case. What, in other words, should be the justificatory burden under which the decision-maker is placed, and which will have to be discharged if the decision is to be found by the reviewing court to be lawful?’¹²²⁸

However, as was highlighted in chapter 2, examination of a selection of well documented CJEU case law on proportionality reveals that there is a considerable variety in the degree of intensity and application by the CJEU of proportionality tests as well as differences in the amount of guidance it gives to the Member States in this context without the CJEU developing any systematic approach. Thus the use of proportionality also needs to be accompanied by a clear, consistent and principled approach to its content and structure in order to provide a clear

Charter, The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and Geneva Conventions, for guidance on what constitutes core human rights. In particular, the Preamble to the United Nations Charter <<http://www.un.org/en/documents/charter/preamble.shtml>> accessed 21.9.14 states that ‘save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom, and for these ends to practice tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples’. See also *ibid* at 15 the rights and obligations for contracting parties specified in the area of economic, social and cultural rights in the International Covenant on Economic, Social and Cultural Rights <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/cescr.aspx>> accessed 21.9.14.

¹²²⁷ P.Craig, ‘Proportionality, Rationality and Review’, (2011) *Oxford Legal Studies Research Paper No. 5/2011*.

¹²²⁸ *Ibid.*, at 1.

doctrinal test that the CJEU can utilise in its case law. This relates to the rule of law principles of certainty and predictability.¹²²⁹

Secondly, Elliott explains how the court needs to consider the rationality of the decision with reference to whether a fair balance has been struck between conflicting interests. This question he accepts ‘reduces, at least to some extent, to a value judgement, the acceptability of the balance struck between two incommensurable variables being impossible to determine unless those variables are first invested with values that are inherently contestable’.¹²³⁰ Thus Elliott here is highlighting a key issue here that of the problem of weighing importance and identifying the weighing process.

On the other hand, Craig argues that ‘proportionality should be used as a general principle of judicial review that can be used both in cases concerned with rights and in non-rights based cases, albeit with varying intensity of review’.¹²³¹ The present author agrees with the latter approach and further argues firstly that in order to illustrate how a subsidiarity and proportionality review could be anchored by the CJEU in this context, there is also a compelling case for determining what specific criteria can be identified by the CJEU in its reasoning in order to anchor a subsidiarity review. This is necessary in order to address the incommensurability problem, which is another way of stating the problem of objectivity/subjectivity. Secondly, that each shared policy area requires different criteria to be taken into account by the CJEU when undertaking any review in order to take account of the different shared policy contexts and to acknowledge the competing interests relevant to a particular policy sector that require balancing. Engaging more meaningfully with subsidiarity will not necessarily prevent the CJEU from continuing to display a pro-union tendency,¹²³² especially as subsidiarity is itself a contested concept and is characterised by a degree of vagueness.¹²³³ However, by adopting such an approach, it is submitted that this would help improve the quality of the CJEU’s reasoning in the context thus enhancing the legitimacy of

¹²²⁹ For further discussion see B. Tamanaha, *On the Rule of Law: History, Politics, Theory*, (Cambridge University Press, 2004).

¹²³⁰ Ibid. See also M. Elliott, ‘Justification, Calibration and Substantive Judicial Review: Putting Doctrine in its Place’, *UK Const. L. Blog* (17th September 2013) < <http://ukconstitutionallaw.org/tag/basis-of-judicial-review/> > accessed 20.6.14.

¹²³¹ Ibid.

¹²³² This was argued in section 5 of chapter 2.

¹²³³ N. Everling, ‘The ECJ as a Decision Making Authority’ (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.’

the CJEU in a key symbolic area of its relationship with national law.¹²³⁴ The EU can only have responsibility for its actions on the basis of a valid competence to carry them out, under the rules of attribution of responsibility in international law, which the European Court of Human Rights applies.¹²³⁵ In order to introduce this discussion, the next section considers how the CJEU when considering travel and residence rights of citizens in various key cases has moved away from a focus on eliminating discrimination and requiring a cross-border element to an emphasis on the fundamental status of citizenship.¹²³⁶ Secondly, some recent cases are examined where the CJEU has tended to reassert the importance of having a cross border element when considering the residency rights of EU citizens.¹²³⁷

2. The shift in the case law of the CJEU from discrimination to the fundamental status of Citizenship

The first case where the CJEU, displaying a pro-union interpretative tendency, relaxed its approach towards the requirement that a cross-border element must be satisfied in order for EU law to be operative was the case of *Rottmann*.¹²³⁸ Dr Rottmann, an Austrian national who was to be prosecuted by the Austrian authorities, moved to Germany as an EU citizen and was granted German naturalization. Subsequently, Germany withdrew his German naturalization which in conjunction with a loss of Austrian citizenship on the grounds he was unable to recover his Austrian citizenship meant that he had no national citizenship status that his EU citizenship could be attached to. As the CJEU ruled,

‘It is clear that the situation of a citizen of the Union who...is faced with a decision withdrawing his naturalization.. placing him...in a position capable of causing him to lose that status conferred by Article 17 EC

¹²³⁴ N.Everling, ‘The ECJ as a Decision Making Authority’ (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.’

¹²³⁵ International Law Commission, *Draft articles on the law of Treaties between States and International Organisations or between international organisations with commentaries*, (1982). For<http://legal.un.org/ilc/texts/instruments/english/commentaries/1_2_1982.pdf> last accessed 29.1.14.

¹²³⁶ See for example Case C-135/08, [2010] ECR I-1449 *Rottmann*.

¹²³⁷ See for example Case C-256/11 *Dereci and others v Bundesministerium fur Inneres*, [2011] ECR I-0000.

¹²³⁸ Case C-135/08, [2010] ECR I-1449 *Rottmann*

[now 9 TEU] and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of EU law'.¹²³⁹

There was no specific mention of the requirement of a cross-border element for EU law to become operative, the latter being a key and well-established requirement of EU free movement law. However, and as Kochenov points out, 'To decide the case on the basis of cross-border logic would essentially have created two different statuses of EU citizenship'.¹²⁴⁰ This would be problematic for example on the grounds inconsistency of treatment between EU citizens, although it would only do so in the sense that free movement would have to be exercised first, which would apply to anyone who as an EU citizen. However, Kochenov has argued that such differing and inconsistent treatment of EU citizens would also devalue the symbolic status of EU citizenship¹²⁴¹ in that it would be contrary to the close tie that citizenship has with that of equality. As Lehring in his essay writes, 'citizenship focuses on equality' and is concerned with 'expanding and enriching the notion of equality by extending its scope through civil, political and social rights'.¹²⁴² The problem with over extending equality though is that conceptually this could lead to the complete harmonisation of all of the rights of citizens. If the only connecting basis with EU competence is the principle of equality, there are no limits to the EU's competence when it comes to citizenship. Shared competence should remain with the Member State only so long as the EU does not exercise it. It is hard to see the limits of shared competence if equality is the underpinning conceptual basis, equality itself already having been subject to much debate in academic literature regarding the differing contested conceptions of equality¹²⁴³ that there are and by Western that

¹²³⁹ Case C-135/08, [2010] ECR I-1449 *Rottmann* para 42. See also M.Gower, See also M.Gower, 'Deprivation of British citizenship and withdrawal of passport facilities – Commons Library Standard Note', <<http://www.parliament.uk/business/publications/research/briefing-papers/SN06820/deprivation-of-british-citizenship-and-withdrawal-of-passport-facilities>> accessed 23.10.14 regarding UK legislation section 40 of the British Nationality Act 1981 (as amended), and section 66 of the Immigration Act 2014, which came into effect on 28 July 2014 and who writes 'In recent years there has been an increasing use of powers to deprive people of their British citizenship and withdraw British passport facilities, particularly in respect of those who may be involved in fighting, extremist activity or terrorist training overseas'.

¹²⁴⁰ See D.Kochenov, 'A Real European Citizenship: A New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe', (2011) 18 *Columbia Journal of European Law* 79.

¹²⁴¹ Ibid at 393 for a discussion of the problems associated with the CJEU's rulings in this case.

¹²⁴² P.B. Lehring, 'European Citizenship: Towards a European Identity?', (2001), 29 *Law and Philosophy* 239-282.

¹²⁴³ S.Fredman, *Women and the Law* (Clarendon Press, Oxford, 1997) at 2 for an outline of the different conceptions of equality.

equality is just ‘an empty concept’.¹²⁴⁴ Is the status of being an EU citizen itself a complementary competence of the EU? If EU citizenship is applied on the basis of equality to shared competence, effectively all EU competences could become shared, giving the EU the capacity to pre-empt national competence.

An outright rejection of a cross border element was also made by the CJEU in the *Zambrano*¹²⁴⁵ case. In this latter case, where the CJEU was called upon to consider whether EU citizenship of two children enabled parents to have a right to reside and work within Belgium, there was no cross-border element present as the two EU citizens here had not moved. Therefore there was no cross-border element. However, despite this, the CJEU held that EU citizenship is not wholly bound up with movement between the Member States. The CJEU then went on to rule that the refusal was an obstacle to the enjoyment of an EU citizens rights and that ‘Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union’.¹²⁴⁶ Thus the third country nationals had the right to stay where they are the parents of Union citizens who are minors.

As Craig and de Búrca point out,

‘certain factual situations which might otherwise have been considered as purely internal situations, are now considered to have a sufficient connection with EU law due to the impact on certain rights enjoyed by virtue of the status of EU citizenship even in circumstances involving a member state national who has never exercised rights of movement outside that member State, that situation will no longer be characterised as a wholly internal situation’.¹²⁴⁷

¹²⁴⁴ P.Westen, in ‘The empty idea of equality’, (1992) 95 (3) Harvard Law Review.

¹²⁴⁵ Case C-34/09 *Gerardo Ruiz Zambrano v Office Nationale de L’emploi (ONEM)* [CJEU, 08 March 2011).

¹²⁴⁶ Case C-34/09 *Gerardo Ruiz Zambrano v Office Nationale de L’emploi (ONEM)* [CJEU, 08 March 2011) para 42.

¹²⁴⁷ P.Craig, and G.de Búrca, *EU Law: Text, Cases and Materials*. (5th ed., Oxford: Oxford University Press, 2011) 833.

Furthermore, and as Wiesbrock points out, such a judgement is ‘sure to trigger lively discussions about...the demarcation of competences between the Union and the Member States’.¹²⁴⁸

On the other hand, Arcarazo and Murphy try to justify the CJEU’s ruling in this case by arguing that,

‘The crisis in, and incoherence of, EU citizenship law is a direct result of the Court’s efforts to do justice in the face of an EU law that creates injustice (the purely internal situation rule). Therefore the judgement in *Ruiz Zambrano*, which may appeal more to the heart than to the head, stretches to the limits our existing understanding of what it means to be a European citizen’.¹²⁴⁹

Interestingly, however, despite the move away from requiring a cross border element and the language used regarding the substance of rights of EU citizens, which some commentators have argued signalled ‘a fundamental change in the logic used by the Court’,¹²⁵⁰ there was no mention of human rights/Charter and right to family life or consideration of the symbolic status of EU citizenship¹²⁵¹ or the importance of enriching the notion of equality by extending its scope through civil, political and social rights.’¹²⁵² Furthermore, not only was there no subsidiarity and proportionality review applied to competences undertaken to justify the CJEU reasoning in this case to justify its straying into the realms of the Member States’ legal and policy decision making particularly where there is no cross border element, the CJEU also failed to consider any ‘evidence to support its factual assumptions’.¹²⁵³ This is a significant omission. For as Hailbronner and Thym point out, ‘the Court should give reasons for major innovations of its dynamic jurisprudence if it wants to be taken seriously as a legal actor’.¹²⁵⁴

¹²⁴⁸ A.Wiesbrock, ‘Union Citizenship and the Redefinition of the internal Situations rule: the Implications of *Zambrano*’, [2011] 12(11) German law Journal 2094

¹²⁴⁹ D.Arcarazo and C.Murphy, *EU Security and Justice Law after Lisbon and Stockholm*, (Hart Publishing, 2014) 13.

¹²⁵⁰ D.Kochenov, ‘A Real European Citizenship: A New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe’, (2011) 18 Columbia Journal of European Law 55 at 68.

¹²⁵¹ Ibid., at 393 for a discussion of the problems associated with the CJEU’s rulings in this case.

¹²⁵² Ibid.

¹²⁵³ N.Shuibhne, ‘Some of the Kids are All Right’, (2012) Common Market Law Review 249-380 at 349.

¹²⁵⁴ K.Hailbronner and D.Thym, ‘Case note *Gerardo Ruiz Zambrano v Office Nationale de L’emploi (ONEm)*’, (2011) 48 Common Market Law Review 1253-1270 at 1259.

The current author proposes that when the CJEU undertakes a subsidiarity and proportionality review that there is a need for the CJEU to act as an arbiter in this context and to include in its reasoning firstly how it has addressed competence issues in its reasoning in every case concerning an area of shared competence. For this could help to counter claims that the CJEU displays an unjustified emphasis in its case law on the need to pursue an ‘ever closer Union’ which deprives Member States of their competencies and is at the expense of the legal systems of the Member States.¹²⁵⁵ It would also be consistent with subsidiarity and its inherent respect for localism in conjunction with the national identity clause in Article 4 (2) TEFU¹²⁵⁶ By eroding national competence, the CJEU is open to being accused of undermining the rights inherent in the democratic process at national level. Even though engaging more meaningfully with subsidiarity will not necessarily prevent the CJEU from displaying a pro-Union interpretative tendency¹²⁵⁷ an explicit explanation of how the CJEU had considered subsidiarity in the CJEU’s reasoning would help to improve the quality of the reasoning of the CJEU and consequently enhance the legitimacy of the CJEU’s ruling.¹²⁵⁸ So the first step is making all these considerations much more explicit.

Secondly, the CJEU needs to identify what rights of EU citizens are sacrosanct in light of the Charter of Fundamental Rights when dealing with cases involving the residency rights of EU citizens. This is an important question in light of the impending accession of the EU to the ECHR and also feeds into wider discussions about the judicial approach to fundamental rights post Lisbon¹²⁵⁹ and the difficulties of balancing subsidiarity applied to competences and a respect for localism with other conflicting principles of EU law. As Konstadinides and O’Meara point out,

¹²⁵⁵ Ibid.

¹²⁵⁶ For further discussion of the identity clause see D.Leczykiewicz, ‘The national identity clause in the EU Treaty: a blow to supremacy of Union law?’, <http://ukconstitutionallaw.org/2012/06/21/dorota-leczykiewicz-the-national-identity-clause-in-the-eu-treaty-a-blow-to-supremacy-of-union-law/> accessed 10.5.13

¹²⁵⁷ This will be considered further in section 2.2 of chapter 3.

¹²⁵⁸ N.Everling, ‘The ECJ as a Decision Making Authority’ (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.’

¹²⁵⁹ See S. Morano-Foadi and S.Andreadakis, ‘Reflections on the Architecture of the EU after the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights’, (2011) pp 595-610 at 595 and who argues that the post-Lisbon era is characterized by firstly the impact of the Charter of Fundamental Rights following Article 6(1) of the TEU and secondly the future accession to the ECHR of the EU pursuant to Article 6(2) TEU.

‘The value of accession in reinforcing the centrality of fundamental rights protection in the EU legal order, and on a practical level, subjecting the EU to external scrutiny should not be underestimated. The relationships between the European Court of Human Rights and the CJEU may be tested, and emerging case law closely scrutinised in cases involving overlap between core Charter and Convention rights, with draft legislation coming under renewed scrutiny for compatibility with the Charter and the ECHR. Commissioner Reding’s statement that EU accession will increase the perception of the European Court of Human Rights as the European capital of fundamental rights protection does not diminish the duties of all courts to robustly adjudicate in defence of fundamental rights protection.’¹²⁶⁰

However, the identification of what rights of EU citizens are sacrosanct in this context is difficult question for the CJEU. For as Schibhne explains when considering cases involving fundamental rights what this

‘reflect[s] more broadly is a sense that when questions about the protection of fundamental rights emerge, there should be a ‘line’ somewhere between the reach of Community law and the internal values and priorities of the States. The most basic expression of this line occurs within the purely internal situation, where no link to Community law at all exists. There, a State’s behaviour in the field of fundamental rights may engage the jurisdiction of the ECtHR, but it should be outwith the competence of Luxembourg. The more typical yet often indistinct line exists when Member States take/are given some internal space within which their own expressions of fundamental rights protection trump/are allowed to trump the requirements of Community free movement law’¹²⁶¹.

Finally, as in the present author’s view that each shared policy area requires different criteria to be taken into account by the CJEU when undertaking any review in order to take account of the different policy contexts, that specific criteria should be identified by the CJEU when considering the right of residence cases for non-economically active citizens where there is no cross border element.

¹²⁶⁰ T.Konstadinides and N.O’Meara, ‘Fundamental Rights and Judicial Protection’ in D.Arcarazo and C.Murphy, *EU Security and Justice Law after Lisbon and Stockholm*, (Hart Publishing, 2014) 83.

¹²⁶¹ Nic Shuibhne, N 2009, ‘Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement Law’, 32(2) *European Law Review*, 230-56 at 241.

Even if the CJEU in the past has approached interpretation from a certain pro-union perspective, if the CJEU adopted the above approach, this will enable the CJEU to anchor subsidiarity and proportionality and help ensure the proper respect for the division of power between the EU and the Member States.

Thus with reference to three particular cases of *Zambrano*¹²⁶², *Dereci*¹²⁶³ and *MacCarthy*¹²⁶⁴, it is proposed that the reasoning of the CJEU should include the CJEU explaining why it is important to protect the symbolic status of EU citizenship.¹²⁶⁵ For example, it could have explained that EU citizenship plays an important role in helping to foster a perception of shared European identity, the latter being identified as a ‘pre-requisite for a functioning democratic European Policy’.¹²⁶⁶ This would include highlighting the symbolic status of EU citizenship and how it has close ties to equality of treatment for all EU citizens in respect of core civil, political and social rights.

On the other hand, the CJEU would also need to justify why in any particular matter, EU citizenship should be allowed to take priority over national citizenship. This would include elaborating in its reasoning as to what the substance of the EU citizenship rights were in this case. It would then need to justify in its ruling that in this case that the substance of the right was so compromised so as not to need to consider any cross-border element. In other words, the CJEU needs to identify a threshold of seriousness in respect of breach of the substance of an EU citizenship right and why national constitutional law should not be allowed to deal with such a situation.

Furthermore, it is proposed that the CJEU should then include in its reasoning the factors in this particular case that it had used to inform its judgement and to justify

¹²⁶² C-34/09 *Gerardo Ruiz Zambrano v Office National de L’Emploi (ONEM)*, [2011] ECR I-1177.

¹²⁶³ Case C-256/11 *Dereci and others v Bundesministerium fur Inneres*, [2011] ECR I-0000

¹²⁶⁴ Case C-434/09 *McCarthy v Home Secretary* [2011] ECR I-0000.

¹²⁶⁵ Case C-34/09 *Gerardo Ruiz Zambrano v Office Nationale de L’emploi (ONEm)* [CJEU, 08 March 2011] paragraph 41 the CJEU ruled that ‘As the Court has stated several times, citizenship of the Union is intended to be the fundamental status of nationals of the Member States’.

¹²⁶⁶ M.Kumm, ‘The Idea of Thick Constitutional Patriotism and its implications for the role and structure of European Legal History’, (2005) 6 (2) German law Journal 319. See also at 320 for a discussion of the importance of identifying a basis for a common European identity and who argues that the constitutional commitment to human rights, democracy and rule of law could be the basis for a common European identity.

it concluding that the substance of an EU citizens rights was so compromised there was no need to consider any cross-border element. The relevant factors in *Zambrano* could have, for example, included discussion of the fact that here the EU citizen was a young child,¹²⁶⁷ the vulnerability of a young child and their dependence on their parents for care and the emotional ties involved between the two child EU citizens and their parents with reference to the Charter of Fundamental Rights and the UN Convention on Rights of the Child.¹²⁶⁸ The addition of such extra reasoning would have provided evidence of the CJEU considering how the substance of EU citizens rights were so compromised here so as not to need to consider any cross-border element. It would also provide further support for the existing final part of the *Zambrano* ruling which concluded in paragraph 45 that, ‘the answer to the questions referred is that Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen’.

More generally, the CJEU in the future in citizenship cases needs to do as a minimum is to outline the core substance of rights that is to be protected regardless of the degree of EU competence. For the CJEU to decide on a minimum floor of rights, though, is difficult as De Búrca questions whether the CJEU’s ‘self referential, formulaic and often minimalist style of reasoning is appropriate to this expanded role’.¹²⁶⁹ However, the rights contained in the European Convention of Human Rights¹²⁷⁰ could be a basis for the CJEU to rely upon. For the rights in the European Convention provide a set of minimum

¹²⁶⁷ See H.Stalford, *Children and the EU*, (2012, Hart Publishing) chapter 3 for a more general discussion of protection of children’s rights to family life in EU law.

¹²⁶⁸ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, <<http://www.refworld.org/docid/3ae6b38f0.html>> accessed 15 July 2014.

¹²⁶⁹ G. De Burca, ‘After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?’, (2013) 20 (2) Maastricht Journal 168.

¹²⁷⁰ European Convention on Human Rights (ECHR) 1950 European Treaty Series No. 05. See also the Universal Declaration of Human Rights <<http://www.un.org/en/documents/udhr/index.shtml>> accessed 30.1.14.

standards¹²⁷¹ in a Convention that all the Member States of the EU have signed up to. In addition, the EU too is currently in the process of acceding to the European Convention of Human Rights.¹²⁷² Thus, it is submitted that CJEU as a minimum should outline the core substance of rights¹²⁷³ that are to be protected in EU citizenship cases regardless of the degree of EU competence drawing upon the rights contained in the European Convention of Human Rights.

However, in more recent case law of the CJEU in the cases of *MacCarthy*¹²⁷⁴ and *Dereci*,¹²⁷⁵ this reveals that the CJEU is resurrecting the cross border rule through adopting a slightly more restrictive approach to the interpretation of the invocation of the citizenship provisions in purely internal situations. This in turn begs the question firstly as to whether their reasoning in these EU citizenship cases invoked in purely internal situations reveals the difference with the earlier case law. Secondly, what is the ambit of the substance of rights that has to be impaired to remove the need for a cross-border element, the latter question already having been implicitly raised in the earlier case of *Zambrano*.

In respect of the case of *MacCarthy*,¹²⁷⁶ this was the first citizenship case invoked in a purely internal situation where the CJEU considered relaxing the cross-border rule. Here Mrs MacCarthy, a mother of three children one of whom was disabled, was an EU citizen who, although she had never moved, sought to gain a right of residency for her husband, a third-country national, in the UK on account of EU

¹²⁷¹ For a more general discussion of the European Convention on Human Rights and the approach of the European Court of Human Rights in balancing the rights in the ECHR with subsidiarity, proportionality and primacy pursuant to the European Convention on Human Rights see J.Christofferson, *Fair Balance: A Study of Proportionality, Subsidiarity and Primacy in the European Convention on Human Rights*, (Brill, 2009) and in particular his contention that there is an obligation on the Contracting Parties to implement the Convention into domestic law as a complement to subsidiarity.

¹²⁷² See Article 6(2) TEU which declares that the EU shall accede to the ECHR. See also the CJEU's opinion 2/13 Opinion 1/13 8.12.14 <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=160882&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=40247>> accessed 8.1.15 regarding the EU's accession to the European Convention on Human Rights where the CJEU has emphasised the need to preserve the autonomy of EU law when considering human rights protection.

¹²⁷³ See J.Christofferson, *Fair Balance: A Study of Proportionality, Subsidiarity and Primacy in the European Convention on Human Rights*, a PhD thesis <[http://www.humanrights.dk/files/pdf/Disputats%20Endelig%202008%2004%2017_%20\(2\).pdf](http://www.humanrights.dk/files/pdf/Disputats%20Endelig%202008%2004%2017_%20(2).pdf)> accessed 14.1.14 at 129 referring to the partly dissenting judgement of Judge Matscher, *Guzzardi v Italy* (6 Nov 1980, Series A, No 39) for a discussion of how although the ECHR talks of the very essence of rights of the ECHR and later at 131 that 'the greatest obstacle to a proper discussion of the analysis of the core of rights is the lack of specificity in the definition or description of the right that may or may not contain an inviolable core'.

¹²⁷⁴ Case C-434/09 *McCarthy v Home Secretary* [2011] ECR I-0000.

¹²⁷⁵ Case C-256/11, *Dereci and others v Bundesministerium fur Inneres*.

¹²⁷⁶ Case C-434/09 *McCarthy v Home Secretary* [2011] ECR I-0000.

citizenship and Directive 2004/39/EC in order to afford her husband residence in the UK. She was also never economically active and was always in receipt of State benefits.¹²⁷⁷

The CJEU however ruled that the Directive here was not able to be relied upon in purely internal situations and that Article 20 TFEU could not be invoked because the national measure at issue in this case did not have the effect of depriving a citizen of their genuine enjoyment of the substance of her citizen rights.¹²⁷⁸

In particular the CJEU emphasised in paragraph 49 of its judgement that,

‘no element of the situation of Mrs McCarthy, as described by the national court, indicates that the national measure at issue in the main proceedings has the effect of depriving her of the genuine enjoyment of the substance of the rights associated with her status as a Union citizen, or of impeding the exercise of her right to move and reside freely within the territory of the Member States, in accordance with Article 21 TFEU’.

The CJEU then went on to distinguish this case from previous case law. Firstly, it stated in para 50 that the case differed firstly with *Zambrano*, in that ‘the national measure at issue in the main proceedings in the present case does not have the effect of obliging Mrs McCarthy to leave the territory of the European Union. Indeed, as is clear from paragraph 29 of the present judgment, Mrs McCarthy enjoys, under a principle of international law, an unconditional right of residence in the United Kingdom since she is a national of the United Kingdom’.

Secondly, the CJEU then went on to distinguish the case with *Avello* in para 51 on the grounds that ‘in that judgment, the Court held that the application of the law of one Member State to nationals of that Member State who were also nationals of an other Member State had the effect that those Union citizens had different surnames under the two legal systems concerned, and that that situation was liable to cause serious inconvenience for them at both professional and private levels resulting from, inter alia, difficulties in benefiting, in one Member State of which they are nationals, from the legal effects of diplomas or documents drawn up in

¹²⁷⁷ Ibid., at para 14.

¹²⁷⁸ Ibid., paras 44-56.

the surname recognised in the other Member State of which they are also nationals'. Here therefore the CJEU is attempting to justify its reasoning in this case that there was no cross border element by distinguishing it with *Avello*.¹²⁷⁹ In this latter case involving economically active EU citizens, the CJEU managed to find a link with EU law on account of the difficulties that was caused to professional and personal lives of Union citizens having different surnames under two legal systems.¹²⁸⁰ Although the CJEU's reasoning here does seem artificial, it does imply that the CJEU was less willing in this case to find a link with EU law when the case involves an economically inactive EU citizen.

Thirdly, the Court noted in *Grunkin and Paul*,¹²⁸¹

‘in circumstances such as those examined in *Garcia Avello*, what mattered was not whether the discrepancy in surnames was the result of the dual nationality of the persons concerned, but the fact that that discrepancy was liable to cause serious inconvenience for the Union citizens concerned that constituted an obstacle to freedom of movement that could be justified only if it was based on objective considerations and was proportionate to the legitimate aim pursued (see, to that effect, *Grunkin et Paul*, paragraphs 23, 24 and 29)’.

Fourthly, the CJEU in para 53 stated ‘that in both *Ruiz Zambrano* and *García Avello*, ‘the national measure at issue had the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status or of impeding the exercise of their right of free movement and residence within the territory of the Member States’.

It then referred to paragraph 49 of the present judgment, in the context of the main proceedings in this case and pointed out that,

¹²⁷⁹ Case C-148/02 *Carlos Garcia Avello v État belge*

¹²⁸⁰ *Ibid.*, para 36 where the CJEU ruled that ‘it is common ground that such a discrepancy in surnames is liable to cause serious inconvenience for those concerned at both professional and private levels resulting from, *inter alia*, difficulties in benefiting, in one Member State of which they are nationals, from the legal effects of diplomas or documents drawn up in the surname recognised in another Member State of which they are also nationals. As has been established in paragraph 33 of the present judgment, the solution proposed by the administrative authorities of allowing children to take only the first surname of their father does not resolve the situation of divergent surnames which those here involved are seeking to avoid’.

¹²⁸¹ Case C-353/06 *Grunkin and Paul* [2008] ECR I-7639.

‘the fact that Mrs McCarthy, in addition to being a national of the United Kingdom, is also a national of Ireland does not mean that a Member State has applied measures that have the effect of depriving her of the genuine enjoyment of the substance of the rights conferred by virtue of her status as a Union citizen or of impeding the exercise of her right of free movement and residence within the territory of the Member States. Accordingly, in such a context, such a factor is not sufficient, in itself, for a finding that the situation of the person concerned is covered by Article 21 TFEU’.

Finally, it concluded in para 55 that there was no cross border element present in this case and that therefore Article 21 TFEU was not applicable here. This really repeated the thrust of the other points.

However, although the CJEU attempted to distinguish this case from previous case law,¹²⁸² there was no elaboration in its reasoning of the scope of the meaning of the genuine enjoyment of the substance of citizenship rights or the criteria upon which it had formulated its reasoning regarding the meaning of this test or what was the real difference. Nor was there any reference to the EU’s Charter of Fundamental Rights or consideration of subsidiarity and proportionality applied to competences despite the CJEU being called upon in this case to consider national measures which deprive an EU citizen of the genuine enjoyment of the substance of their citizen rights in policy areas on the edge of the EU’s competence. Proportionality here relates to the genuine substance: genuine substance implies a breach of proportionality: is it conceptually any different to subsidiarity though? Subsidiarity seems to be prior to proportionality. Subsidiarity seems to directly relate to the cross-border element requirement as it goes to very exercise of EU competence.

¹²⁸² See N.Shuibhne, ‘Some of the Kids are All Right’, (2012) Common Market Law Review 249-380 at 358 who points out that the CJEU also ‘referred to the contrasting, in its view, surname/identity decisions in *Garcia Avello* and (later) *Grunkin and Paul*, noting that the serious inconvenience that stemmed from dual nationality in those cases was liable to constitute an obstacle to free movement, and did have the effect of depriving Union citizens of the genuine enjoyment of their rights – but this was materially different in the Court’s view from the situation faced by Mrs McCarthy’.

With regard to the *Demirci* case,¹²⁸³ this case was brought before the CJEU following references raised by 5 different national courts where citizenship was invoked again in a purely internal situation. Again the CJEU confirmed in para 58 that Directive 2004/38 is not applicable to third country nationals ‘who apply for the right of residence in order to join their European Union citizen family members who have never exercised their right to free movement and who have always resided in the Member State of which they are nationals’. The situation is different for third country nationals where they are recognised family members of an EU citizen who has exercised their free movement.¹²⁸⁴ For example, the Commission guidance on Directive 2004/38 advises that ‘third country family members should be issued as soon as possible and on the basis of an accelerated procedure with a free of charge short-term entry visa.....as the right to be issued with an entry visa is derived from the family link with the EU citizen, Member States may require only the presentation of a valid passport and evidence of the family link¹²⁸⁵ (and also dependency, serious health grounds, durability of partnerships, where applicable). No additional documents, such as a proof of accommodation or of sufficient resources, an invitation letter or return ticket, can be required.’¹²⁸⁶ Furthermore, in the case of *Metock*, the CJEU ruled that Directive 2004/38 prohibited a host Member State from requiring prior lawful residence in another Member State for a third country national spouse of an EU citizen [e.g. of sham marriages after free movement exercised) in another Member State.¹²⁸⁷ However, it is unclear from the case law as to the extent of the scope of the Directive when considering, for example, where EU citizens move to another Member State whether a third country national family would automatically get all European rights that are available to an EU migrant citizen. There is also little discussion in *Demirci* as to what extent free movement might be necessary and whether there is a de minimis threshold.¹²⁸⁸ Interestingly, Janssen and Kallimo

¹²⁸³ Case C-256/11, *Dereci and others v Bundesministerium für Inneres*, [2011] ECR I-0000.

¹²⁸⁴ Article 5(2) Directive 2004/38.

¹²⁸⁵ Article 8(5) and 10(2) Directive 2004/38.

¹²⁸⁶ EC Commission, ‘Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States’ at P.6

¹²⁸⁷ Case C-127/08, *Blaise Baheten Metock & Others v Minister for Justice, Equality and Law Reform (Metock & Others)*, 3 CKLR 39 (2008) para 72. This case was also considered in section 3.4 of chapter 4 in this thesis.

¹²⁸⁸ Although the Commission did point out in *Demirci* para 40 that ‘neither is there a barrier to the exercise of the right conferred on Union citizens to freedom of movement and residence within the territory of the Member States’. See also the area of competition law the use of the de minimus

have already argued for a de minimus threshold in relation to movement of goods and that there is evidence already of the CJEU applying a hypothetical de minimus test in the free movement context.¹²⁸⁹ Furthermore, they propose that in relation to free movement of goods cases concerning the restrictive effects on market access that ‘restrictive effects on market access could potentially be differentiated from restrictive effects on trade at large by defining market access as an expression that reflects a de minimis rule. Minimal restrictive effects that only reduce trade do not create an effect on market access, while restrictions on trade that are severe enough to actually hinder a trader from entering a market, or force an established trader to leave a market, would have an effect on market access. The de minimis threshold thus would distinguish what is “severe enough”. Without a distinction, the notion of “hindering market access” itself could be plagued by the very problem of an indefinite scope, which the *Keck*¹²⁹⁰, *Trailers*¹²⁹¹ and *Mickelson*¹²⁹² cases sought to solve for non-discriminatory measures’.

On the other hand, in the case of *Demirci*,¹²⁹³ the CJEU was also called upon to consider the criterion for the effect of depriving a citizen of the enjoyment of the substance of their rights involved. However, the CJEU ruled that this was only a consideration where an EU citizen was ‘[leaving] not only the territory of the Member State in which he is a national but also the territory of the EU as a whole’.¹²⁹⁴ So, for example, this might arise where the spouse of an EU citizen was being expelled from his or her own Member State in accordance with the laws of that Member State on the grounds of national or public security. The

principle is included in Article 101(1) where ‘If agreements have an a “negligible effect on competition they may therefore not be prohibited by Article 101(1).” See also Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de *minimis*)

¹²⁸⁹ M.Jansson and H.Kalimo, ‘De minimis meets “market access”: Transformation in the substance – and the syntax- of EU Free Movement Law, (2014) 51 Common Market Law Review 523-558 at 548 referring to the cases of Case C-69/88, *H. Krantz GmbH & Co. v. Ontvanger der Directe Belastingen and Netherlands State*, [1990] ECR I-583 in relation to the free movement of goods, and Case C-190/98, *Volker Graf v. Filzmoser Maschinenbau GmbH*, [2000] ECR I-493 in relation to the free movement of workers.

¹²⁹⁰ Joined Cases C-267 & 268/91, *Criminal proceedings against Bernard Keck and Daniel Mithouard (Keck)*, [1993] ECR I-6097.

¹²⁹¹ Case C-110/05, *Commission v. Italian Republic (Trailers)*, [2009] ECR I-519.

¹²⁹² Case C-142/05, *Åklagaren v. Percy Mickelsson and Joakim Roos (Mickelsson)*, [2009] ECR I-427.

¹²⁹³ Case C-256/11, *Dereci and others v Bundesministerium für Inneres*, [2011] ECR I-0000.

¹²⁹⁴ *Ibid.*, at Para 66. For further discussion of this case see D.Kochenov, ‘A Real European Citizenship: A New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe’, (2011) 18 Columbia Journal of European Law 55 at 86-91.

latter situation would lead to difficult questions as to the effect of such a deportation on other family members such as a spouse or children especially where the spouse or children are financially and emotionally dependent on the EU citizen facing deportation and the question of balancing what degree of financial and or emotional dependence is involved against other public concerns and the CJEU justifying how it has balanced such issues. The CJEU has already been faced balancing competing interests in the context of the freedom to provide services when expelling a carer of a child who was a European citizen in the case of *Carpenter*¹²⁹⁵.

In undertaking the balance in this case the CJEU recognised the importance of protection of family life¹²⁹⁶ and in para 39 that to separate

‘Mr and Mrs Carpenter would be detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom. That freedom could not be fully effective if Mr Carpenter were to be deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse’.

The CJEU then continued in para 40 that,

‘A Member State may invoke reasons of public interest to justify a national measure which is likely to obstruct the exercise of the freedom to provide services only if that measure is compatible with the fundamental rights whose observance the Court ensures (see, to that effect, Case C-260/89 ERT [1991] ECR I-2925, paragraph 43, and Case C-368/95 *Familiapress* [1997] ECR I-3689, paragraph 24)’.

The CJEU also referred to Article 8 of the of the Convention for the Protection of Human Rights and Fundamental Freedoms, ruling that even though protection of family life was a fundamental right,¹²⁹⁷ ‘that the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed by Article 8(1) of the Convention’. It then ruled that an infringement will,

¹²⁹⁵ Case C-60/00 *Carpenter* [2002] ECR I-62709;

¹²⁹⁶ *Ibid.*, para 38.

¹²⁹⁷ *Ibid.*, para 41.

‘infringe the Convention if it does not meet the requirements of paragraph 2 of that article, that is unless it is in accordance with the law, motivated by one or more of the legitimate aims under that paragraph and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see, in particular, *Boultif v Switzerland*, no. 54273/00, §§ 39, 41 and 46, ECHR 2001-IX)’.¹²⁹⁸

In light of the above reasoning, the CJEU then ruled in para 43 that ‘A decision to deport Mrs Carpenter, taken in circumstances, such as those in the main proceedings, does not strike a fair balance between the competing interests, that is, on the one hand, the right of Mr Carpenter to respect for his family life, and, on the other hand, the maintenance of public order and public safety.’ However, the CJEU did not justify its balance here or consider what the threshold for effect was on free movement here. Rather it simply concluded in para 45 that the decision to deport Mrs Carpenter was ‘disproportionate to the objective pursued’.

Interestingly, in *Demirci*, too in paragraph 69 points out that in cases involving the questions relating to residence rights and keeping the family of an EU citizen together that ‘this must be tackled in the framework of the provisions on the protection of fundamental rights which are applicable in each case’. However, the CJEU in this case does not itself consider explicitly whether refusal of right of residence undermines the right for respect for private and family life provided by Art 7 of the Charter. Rather it ruled that,

‘if the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by EU law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter. On the other hand, if it takes the view that that situation is not covered by EU law, it must undertake that examination in light of Article 8(1) ECHR’.¹²⁹⁹

Thus the CJEU brought the situation within the scope of EU law, but left the determination for national courts, thereby adopting an expansionary approach to

¹²⁹⁸ Ibid., para 42.

¹²⁹⁹ Ibid., at para 72.

the scope of EU law, while being careful to maintain some jurisdictional deference to national authorities who are already bound by the ECHR when deciding cases. This it is submitted is a more valid approach in light of subsidiarity but still without substantive criterion or criteria to determine the correctness of the national court's possible different decisions.

More recently in the case of *O and S*¹³⁰⁰ the CJEU has provided some specific guidance for the national court when assessing whether the refusal of a residence permit for a male spouse of a mother of a Union citizen is 'liable to undermine the effectiveness of the Union citizenship enjoyed by the Union citizens concerned.'¹³⁰¹

The case involved two references concerning third country applicants for resident permits in Finland where those applicants lived with a third country national spouse who had a child who was a Union citizen.¹³⁰²

However, the case here was distinguished from *Zambrano* by the CJEU on the grounds that the male spouses were not the biological fathers of the child Union citizen¹³⁰³ and did not have custody of the child Union citizen. Nor were the child Union citizens dependent on them.¹³⁰⁴ In addition, the child Union citizen had never made use of their right of free movement and had always lived in the Member State of which they were nationals.¹³⁰⁵

The CJEU then ruled that the principle established in *Zambrano* that 'Article 20 TFEU precludes national measures....which have the effect of denying Union citizens the genuine enjoyment of the substance of the rights conferred by their status'¹³⁰⁶, only applies in exceptional circumstances but that 'it does not follow from the Court's case-law that their application is confined to situations in which there is a blood relationship between the third country national for whom a right of residence is sought and the Union citizen who is a minor from whom that right of residence might be denied'.¹³⁰⁷

¹³⁰⁰ Joined Cases C 356/11 and C 357/11, Judgment - *O, S v Maahanmuuttovirasto (C-356/11), and Maahanmuuttovirasto v L (C-357/11)*

¹³⁰¹ *Ibid.*, para 53.

¹³⁰² *Ibid.*, para 36.

¹³⁰³ *Ibid.*, para 38.

¹³⁰⁴ *Ibid.*, para 39.

¹³⁰⁵ *Ibid.*, para 42.

¹³⁰⁶ *Ibid.*, para 42.

¹³⁰⁷ *Ibid.*, para 55.

Secondly, drawing on point 44 of the opinion of the Advocate General in this case it advised the national court to take into account, on the one hand, the nature of the relationship of dependence between the child Union citizen and the third country national denied a right of residence taking into account. However, on the other hand, it also put forward a caveat that the Member States must ensure that its interpretation of the national law at issue in this case did not conflict with EU fundamental rights¹³⁰⁸ as at the end of the day it is the national court who has ‘to make a balanced and reasonable assessment of all the interests in play, taking particular account of the interests of the children concerned.’¹³⁰⁹

However, is such an approach by the CJEU whereby it leaves to the Member States’ national court matters raising fundamental rights issues such as whether refusal of a right of residence undermines the Charter right to respect for family life and the reasoning to support such an approach a justifiable one? On the one hand, it could be argued that citizenship following the Treaty of Lisbon and the giving of legal effect to a Bill of Rights in the Charter of Fundamental Rights demands that the CJEU at least engages on the grounds of fairness and justice in its reasoning with the practical realisation of EU citizenship for all EU citizens and their family members irrespective of whether they have crossed a border or not.¹³¹⁰ The problem is it is not possible to draw any line in the approach of the Court and the justification of the exercise of EU competence at all, which is central to subsidiarity, cannot really be made out on this basis.

Furthermore, the radical and dynamic nature of this line of case law and the CJEU’s reasoning, especially in cases concerning what residence rights are available to family members of EU citizens has been criticised. For although EU citizenship is a key concept in EU law, the CJEU has failed to provide a definitive answer as to what EU citizenship means and it is also unclear to citizens as to when they can rely on the citizenship provisions. As Kochenov argues, ‘while the infringement of some EU citizenship rights triggers automatic application of EU law no matter what and allows drawing concrete benefits from the possession of the status of EU citizenship-like the work and residence rights for a third-country

¹³⁰⁸ Ibid., para 78.

¹³⁰⁹ Ibid., para 81 and para 79 where the CJEU stated that the Member States still retain a margin of appreciation when considering applications for residence by third country nationals.

¹³¹⁰ See further D. Kochenov, ‘The Right to have What Rights? EU Citizenship in Need of Clarification’, (2013) 19 European Law Journal 3 at 15 who argues that ‘in the absence of any decipherable test, the only source of substance of rights of EU citizenship is thus the case-law of the ECJ itself, where such rights are presumably named’.

national parent of static EU citizen children in *Ruiz Zambrano*¹³¹¹ - other, alarmingly similar factual situations produce a contrary result – like the lacking EU residence right of a third-country national spouse of a mother of static citizen children in a family touched by child disability in *McCarthy*.¹³¹² Here the key question is about drawing the limits of the EU's competence. The CJEU in its citizenship case law has indicated that economic self-sufficiency¹³¹³ is subject to nationals not being an unreasonable burden, - but this is very open ended.¹³¹⁴

Most recently, in the *Ida* case¹³¹⁵ the CJEU has been called upon again to consider the *Zambrano* case. However, the case of *Zambrano* was again distinguished by the CJEU from the facts at issues in this case in that 'the present case displays a peculiarity in that the third-country national is not applying for a right of residence in the Member State in which his daughter, the Union citizen, is living',¹³¹⁶ even though this case involved Mr Ida arguing that he retained a right to stay in Germany on the basis of his daughter's right to a family life where the daughter had moved to Austria. Furthermore, the CJEU when considering whether an EU citizen is deprived of the general enjoyment of the substance of their rights appears implicitly to reassert its emphasis on the fundamental precondition of the existence of a cross border situation for the application of the free movement rules¹³¹⁷ when it rules,

‘It must be recalled that the purely hypothetical prospect of exercising the right of freedom of movement does not establish a sufficient connection with European Union law to justify the application of that law's provisions

¹³¹¹ Case C-34/09 *Gerardo Ruiz Zambrano v Office Nationale de L'emploi (ONEm)* [CJEU, 08 March 2011].

¹³¹² Case C-434/09 *McCarthy v Home Secretary*. See also D.Kochenov, 'The Right to Have What Rights: EU Citizenship in Need of Clarification', (2013) 19 European Law Journal at 3.

¹³¹³ See also Article 7 European Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States which includes that Union citizens are only entitled to reside in the host Member State for more than three months if they are either economically active or have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State and have comprehensive sickness insurance cover in that State.

¹³¹⁴ For example, in Case C-184/99, *Grzelczyk v Centre Public D'Aide Sociale D'Ottignies-Louvain-La-Neuve* [2012] 1 CMLR 19 para 31 the CJEU ruled that it could rely on a non-discrimination clause in claiming a social advantage provided this did not place an unreasonable hindrance on the welfare system of the host State'.

¹³¹⁵ Case C-40/11 *Yoshikazu Iida*, 8.11.12.

¹³¹⁶ Case C-40/11 *Yoshikazu Iida*, 8.11.12 Advocate General Opinion at para 1.

¹³¹⁷ *Ibid.*, para 77.

(see Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 16). The same applies to purely hypothetical prospects of that right being obstructed’.

This contrasts with the CJEU’s approach to potential free movement obstacles in *Dassonville* where the CJEU stated that, ‘All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.’¹³¹⁸

On the other hand, in respect of consideration of the Charter of Fundamental Rights to the facts at issue in the *Ida* case, significantly, the Advocate General in delivering his opinion in this case heavily relied upon the Charter of Fundamental Rights ruling in para 88 that,

‘in light of ...Articles 7 and 24 of the Charter of Fundamental Rights, a parent who has a right of custody and is a third-country national can, in order to maintain a personal relationship and direct parental contact on a regular basis, have a right of residence in the member State of origin of his child who is a Union citizen under Article 20 TFEU and 21 TFEU, if the child has moved from there to another Member State, exercising his right of free movement. For such a right of residence to exist, the denial thereof must have a restrictive effect on the child’s right to freedom of movement and must be regarded as amounting to a disproportionate interference with fundamental rights in the light of the abovementioned fundamental rights.’

He then assigned the actual weighing up of this to the national court.

The CJEU, on the other hand, emphasised in its reasoning the limits of the scope of the Charter of Fundamental Rights when it ruled in paragraph 78,

¹³¹⁸ Case 8/74, *Dassonville* [1974] ECR 837. See also Case C 415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* where the CJEU ruled in paras 99 – 100 ‘that in relation to transfer rules applying to the transfer of football players between clubs belonging to different national associations within the same Member State that these rules ‘are likely to restrict the freedom of movement of players who wish to pursue their activity in another Member State by preventing or deterring them from leaving the clubs to which they belong even after the expiry of their contracts of employment with those clubs. Since they provide that a professional footballer may not pursue his activity with a new club established in another Member State unless it has paid his former club a transfer fee agreed upon between the two clubs or determined in accordance with the regulations of the sporting associations, the said rules constitute an obstacle to freedom of movement for workers’.

‘As to the fundamental rights mentioned by the referring court, in particular the right to respect for private and family life and the rights of the child, laid down in Articles 7 and 24 of the Charter respectively, it must be borne in mind that, in accordance with Article 51(1) of the Charter, its provisions are addressed to the Member States only when they are implementing European Union law. Under Article 51(2) of the Charter, it does not extend the field of application of European Union law beyond the powers of the Union, and it does not establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties’.

This then raises the problem that the CJEU is not always clear in its general case law on the limits of EU powers e.g. between general and specific powers.

The CJEU also ruled in paragraph 81 that,

‘the German authorities’ refusal to grant Mr Ida a residence card of a family member of a Union citizen ‘does not fall within the implementation of European Union law within the meaning of Article 51 of the Charter, so that its conformity with fundamental rights cannot be examined by reference to the rights established by the Charter’.

Thus the CJEU felt unable to consider the conformity of this measure with reference to Charter rights. It therefore concluded that ‘outside situations governed by the Directive 2004/38 and where there is no other connection with the provisions on citizenship of European Union law, a third-country national cannot claim a right of residence derived from a Union citizen’.¹³¹⁹ This was even though Directive 2004/38 does provide that the Member State should be required before refusing a right of residence to a family member of an EU citizen¹³²⁰ to

¹³¹⁹ Case C-40/11 *Yoshikazu Iida*, 8.11.12 para 82.

¹³²⁰ Article 2 (2) of Directive 2004/38 provides that ‘Family member’ means:

- (a) the spouse;
- (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
- (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);
- (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b).’

‘undertake an extensive examination of the personal circumstances and shall justify any denial of entry of residence to these people.’¹³²¹

Again, therefore, the CJEU is leaving to the Member States’ national court matters raising fundamental rights issues with little mention of fairness and justice in its reasoning regarding the practical realisation of EU citizenship for all EU citizens and their family members irrespective of whether they have crossed a border or not.¹³²² Furthermore, there is inconsistency across the cases considered in respect of considering limits of EU competences. Nor was there any consideration by the CJEU of subsidiarity and proportionality applied to competences despite the case involving a shared competence area and involving the CJEU to strike a difficult balance between EU citizens’ residency rights where they are economically inactive and the Charter of Fundamental Rights.

Similarly, in the more recent case of *Alokpa and Moudoulou* case,¹³²³ the CJEU has again made no reference to subsidiarity applied to competences when dealing with cases involving areas of shared competence but rather left to the Member States’ national court matters raising fundamental rights issues where there has been no cross border element. The case itself concerned a Mrs Alokpa, a third country national, who had twins prematurely in Luxembourg. Although Mrs Alokpa was a third country national, the twins were however EU citizens as they were French nationals on account of their father being a French national.

¹³²¹ Article 3 (2) of Directive 2004/38 provides ‘Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;

(b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people’.

¹³²² See further D. Kochenov, ‘The Right to have What Rights? EU Citizenship in Need of Clarification’, (2013) 19 European Law Journal at 15 who argues that ‘in the absence of any decipherable test, the only source of substance of rights of EU citizenship is thus the case-law of the ECJ itself, where such rights are presumably named’.

¹³²³ Case C-86/12, *Adzo Domenyo Alokpa, Jarel Moudoulou, Eja Moudoulou v Ministre du Travail, de l’Emploi et de l’Immigration*.

However, as it was the mother who was the sole carer of the twins as the father had absconded, Mrs Alokpa therefore applied for an extension of temporary discretionary residence in Luxembourg that was granted to her on account of her twins requiring care due to their prematurity.¹³²⁴ However she was denied continual residence on the grounds that she did not fall within the permitted categories of an EU citizen's family member as this 'is restricted to dependent relatives in the direct ascending line', and secondly, the twins had not exercised their right of free movement.¹³²⁵ The national court therefore referred the following question to the CJEU for a preliminary ruling:-

'Is Article 20 TFEU – if necessary, read in conjunction with Articles 20, 21, 24, 33 and 34 of the Charter of Fundamental Rights [of the European Union], or with one or more of those provisions read separately or in conjunction – to be interpreted as precluding a Member State from refusing a third-country national, with sole responsibility for his or her minor children who are citizens of the European Union, residence in the Member State of residence of the children, where they have been living with that person since birth, without having that nationality, while refusing the third-country national a residence permit, or even a work permit? Are such decisions to be regarded as being in the nature of decisions depriving those children, in their country of residence, in which they have lived since birth, of effective enjoyment of the substance of the rights attaching to the status of citizen of the European Union also in the situation where their other direct ascendant, with whom they have never shared family life, is resident in another Member State of the European Union, of which that person is a national?'¹³²⁶

However, despite the explicit reference by the national court to the Charter of Fundamental Rights in conjunction with Articles 20, 21, 24, 33 and 34 TFEU, the CJEU made no reference to the Charter of Fundamental Rights. Rather it simply ruled that it was for the national court to decide whether, pursuant to Article 7 (1) (b) of Directive 2004/38 the children, as EU citizens, had sufficient resources and comprehensive sickness insurance cover either 'on their own or through their

¹³²⁴ Ibid., paras 13-16

¹³²⁵ Ibid., para 18.

¹³²⁶ Case C-86/12, *Adzo Domenyo Alokpa, Jarel Moudoulou, Eja Moudoulou v Ministre du Travail, de l'Emploi et de l'Immigration* para 19.

mother'.¹³²⁷ If such conditions were not met, according to the CJEU, the national court was able to refuse residence.¹³²⁸ Nor did the CJEU make any reference to the UN Convention on the Rights of the Child.¹³²⁹

The CJEU, referring to previous specific case law, did, though, add a caveat in para 33 about ensuring the genuine enjoyment of the substance of EU citizens rights in that,

'if the referring court holds that Article 21 TFEU does not preclude Mrs Alokpa from being refused a right of residence in Luxembourg, that court must still determine whether such a right of residence may nevertheless be granted to her, exceptionally – if the effectiveness of the Union citizenship that her children enjoy is not to be undermined – in light of the fact that, as a consequence of such a refusal, those children would find themselves obliged in practice to leave the territory of the European Union altogether, thus denying them the genuine enjoyment of the substance of the rights conferred by virtue of that status'.

The CJEU also pointed out in para 34 that as the twins were already French citizens that the mother could,

'as sole carer of those children since their birth, could have the benefit of a derived right to reside in France' that in these circumstances refusal by the Luxembourg authorities would not 'deprive those citizens of effective enjoyment of the substance of the rights conferred by virtue of the status of European Union citizenship, a matter which is to be determined by the referring court'.¹³³⁰

The facts of the case here therefore differed to *Zambrano* in that the twins did not live in the country of their nationality although surely requiring the mother of the twins to move away from this particular Member State to another Member State is a significant disruption to the effective enjoyment of the substance of the rights of

¹³²⁷ Ibid., para 30.

¹³²⁸ Ibid., para 31.

¹³²⁹ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, <<http://www.refworld.org/docid/3ae6b38f0.html>>accessed 15 July 2014.

¹³³⁰ Case C-86/12, *Adzo Domenyo Alokpa, Jarel Moudoulou, Eja Moudoulou v. Ministre du Travail, de l'Emploi et de l'Immigration* para 36.

those child EU citizens. So here the CJEU seemed to say EU citizenship could apply in default of any protection at national level, and it did not scrutinise possible rights under French law, it just noted the possibility – this suggests a certain deference consistent with subsidiarity, but not articulated as such.

The cases examined above concerning the protecting the rights of citizens and their family members reveal that the reasoning employed by the CJEU show a lack of convincing justification for each ruling with no explicit consideration of subsidiarity applied to competences at all. Even where there is no change in case outcomes an explicit explanation of how the CJEU had considered subsidiarity in the CJEU's reasoning would help to improve the quality of the reasoning of the CJEU and consequently enhance the legitimacy of the CJEU's ruling.¹³³¹

The question was then posed as to whether a subsidiarity review might be helpful here to the CJEU when considering citizenship cases involving the residency rights of EU citizens and family members of EU citizens? On one hand, should the CJEU utilise subsidiarity in its reasoning in this context and provide evidence of the need to respect for Member State regulatory regimes consistent with subsidiarity and a respect for localism. But on the other hand, when the CJEU scrutinises aspects of Member State regulatory regimes is there a need for it act as an arbiter between respect for the Member States law and protecting the residence rights of EU citizens and their family members (with reference to the Charter) and ensuring fairness and justice.

As a supranational court primarily experienced in matters of European integration, this role is taking the CJEU out of its comfort zone (though the CJEU has a broad comfort zone given its very expansive interpretation of EU competences and its pro-union interpretative tendency)¹³³² and straying into issues that have either been the preserve of national constitutional courts at a national level or fundamental human rights at an international level.¹³³³

¹³³¹ N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.'

¹³³² This is discussed in chapter 3 section 2.2.

¹³³³ Competence and rights protection issues can also overlap as evidenced recently in the case of C 399/09 *Landtova* 22 June 2011 nyr and discussed in a case note by R.Zbiral, 'Restoring Tasks

3. Could a subsidiarity and proportionality review be helpful here and, if so, what criteria should such a review involve?

The previous section has highlighted how cases involving the rights of EU citizens who are economically inactive¹³³⁴ frequently involve sensitive immigration issues¹³³⁵ or entitlement to welfare issues¹³³⁶ on the borderline of EU competences.¹³³⁷ Despite this, it was also explained how the CJEU, displaying a pro-union interpretative tendency, has paid little attention to subsidiarity and proportionality applied to the clear delineation of competences or to demonstrate much respect for local laws in citizenship cases concerning the rights of EU citizens who are economically inactive.¹³³⁸ Furthermore, it was explained in section 2 how these cases all fall short in explaining the limits of EU law requirements, especially regarding the substance of rights, purely internal situations and what unreasonable burden means re financial implications. A key argument of this thesis is that if the CJEU were to undertake a subsidiarity and proportionality review which involved a consideration of the limits and scope of EU competence in a particular shared competence area, this would demonstrate its

from the EU to the Member States: A Bumpy Road To An Unclear Destination', (2012) 49 Common Market Law Review 1475-1492 regarding the Czech constitutional Court annulling an EU act on the grounds of ultra vires conduct of the EU institutions and the challenge this posed to the CJEU's traditional concern with integration.

¹³³⁴ See for example Case C-85/96, *Martinez Sala v Freistaat Bayern*, [1998] ECR I-2691

¹³³⁵ For further discussion see HM Government, Review of the Balance of Competences between the United Kingdom and the European Union Asylum and Migration (HM Government, 2014) and who outline in section 1.5 how 'the EU's power in immigration and asylum issues has increased over the last 15 years' and how 'The 2009 Treaty on the Functioning of the European Union (TFEU) saw further changes to the scope for EU action allowing the development of common EU policies on asylum and on the immigration of third country nationals generally rather than merely minimum standards. It constituted a significant widening of the EU's competences in this area. The Lisbon Treaty collapsed the pillar structure and moved Title IV into a new Title V: the 'Area of Freedom, Security and Justice' of the TFEU. 'Policies on Border Checks, Asylum and Immigration' was incorporated as Chapter two of this new Title V, retaining the Opt In Protocol. This is an area of shared competence between the EU and its Member States'.

¹³³⁶ The EU shares competence with the Member States in the field of social welfare policy. See also HM Government, Review of the Balance of Competences between the United Kingdom and the European Union Social and Employment Policy (HM Government, 2014) which discusses how in '1.28 In the field of social policy, the Lisbon Treaty made some important changes. It included in the objectives of the Union, listed by Article 3 TFEU, the 'well being of its people'; the establishment of a 'highly competitive social market economy, aiming at full employment and social progress'; its commitment to 'combat social exclusion and discrimination'; to 'promote social justice and protection, equality between women and men, solidarity between generations and protection of rights of the child'.

¹³³⁷ See Chapter 4 and 5 for further discussion.

¹³³⁸ See for example Case C-85/96, *Martinez Sala v Freistaat Bayern*, [1998] ECR I-2691

adherence to the rule of law,¹³³⁹ the latter being enshrined in Article 2 TEU.¹³⁴⁰ Even if the CJEU in the past has tended to display a pro-union interpretative tendency, adhering to the rule of law is an important issue for the CJEU to demonstrate its respect for a core value commonly associated with democracy¹³⁴¹ and with the validity of law itself.¹³⁴²

Subsidiarity is prior to proportionality and relates to identification of limits of EU competence. Any subsidiarity review should involve the CJEU checking whether the Union has competence to act (conferral) and in cases concerning areas of shared competence the undertaking of such a review an explicit explanation of how the CJEU had considered subsidiarity in the CJEU's reasoning would help to improve the quality of the reasoning of the CJEU and consequently enhance the legitimacy of the CJEU's ruling.¹³⁴³ This is consistent with the EU's overarching aim to have democratic, transparent and efficient institutions through the adherence to values commonly associated with democracy¹³⁴⁴ and the problem of ultra vires EU action lacking legitimacy in the Member States eyes.¹³⁴⁵

In respect of the proportionality element of the review, this needs to relate to the actual consideration and weighing up by the CJEU of the competing interests identified in this context. This requires the CJEU to identify explicitly in its reasoning any competing interests that have been weighed up as well as stating any other particular factors involved in the balancing and the weight accorded to

¹³³⁹ For further discussion see B.Tamanaha, *On the Rule of Law: History, Politics, Theory*, (Cambridge University Press, 2004).

¹³⁴⁰ See also K.Lenaerts, 'Upholding Union Values in Times of Societal change: the Role of the Court of Justice of the European Union'. <https://www.dur.ac.uk/resources/deli/events/annual%20lecture%202014/Lenaerts_2014_Durham.pdf> accessed 1.7.14.

¹³⁴¹ For further discussion see B.Tamanaha, *On the Rule of Law: History, Politics, Theory*, (Cambridge University Press, 2004).

¹³⁴² See further L.Fuller *Inner Morality of Law*, (New Haven, London: Yale University Press, 1964).

¹³⁴³ N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.'

¹³⁴⁴ Laeken Declaration <http://europa.eu/rapid/press-release_PRES-01-902_en.htm> accessed 4.7.14.

¹³⁴⁵ *Brunner v The European Union Treaty* [1994] 1 CMLR 57.

those factors. The next section will consider this further in relation to the cases of *Zambrano*¹³⁴⁶, *Dereci*¹³⁴⁷ and *MacCarthy*?¹³⁴⁸

However, the above cases considered in section 2 involving rights of EU citizens who are economically inactive¹³⁴⁹ frequently involve issues relating to the private and family life of EU citizens.¹³⁵⁰ The CJEU therefore needs to consider Article 7 of the Charter. In respect of the wording of Article 7 of the Charter, this provides that ‘everyone has the right to respect for his or her private and family life, home and communications’. Examination of the explanatory memorandum to the Charter includes an explanation of how the word ‘communications’ has been used rather than correspondence to ‘take account of developments in technology’. Furthermore, the explanatory memorandum invites comparison with the ECHR equivalent in respect of the meaning and scope of these rights as it includes that, ‘the meaning and scope of this right are the same as those of the corresponding Article of the ECHR. Consequently, the limitations which may legitimately be imposed on this right are the same as those allowed by Article 8 ECHR:

‘1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others’.

With this in mind, how therefore should the CJEU more meaningfully engage with subsidiarity in its judicial reasoning when striking a balance between competing issues of immigration or welfare on the one hand and, on the other, the Charter rights of EU citizens? This is an important question as subsidiarity relates to competence but proportionality goes to the extent of the

¹³⁴⁶ C-34/09 *Gerardo Ruiz Zambrano v Office National de L’Emploi* (ONEM), [2011] ECR I-1177.

¹³⁴⁷ Case C-256/11 *Dereci and others v Bundesministerium für Inneres*, [2011] ECR I-0000

¹³⁴⁸ Case C-434/09 *McCarthy v Home Secretary* [2011] ECR I-0000.

¹³⁴⁹ See for example Case C-85/96, *Martinez Sala v Freistaat Bayern*, [1998] ECR I-2691

¹³⁵⁰ See for example C-34/09 *Gerardo Ruiz Zambrano v Office National de L’Emploi* (ONEM), [2011] ECR I-1177

CJEU's exercise in the facts of a particular case. The next section considers firstly how the CJEU could more meaningfully engage with subsidiarity in its judicial reasoning. Secondly, in respect of the proportionality element of the review how it could be explicit in its reasoning as to how it has struck a balance between competing issues of immigration or welfare on the one hand and, on the other, the Charter rights of EU citizens.¹³⁵¹

4. How should the CJEU more meaningfully engage with subsidiarity and proportionality in its judicial reasoning

As subsidiarity is prior to proportionality, any subsidiarity and proportionality review in cases concerning the residence rights of EU citizens including those who are economically inactive should at the very least involve the CJEU making explicit reference in its reasoning to firstly how it has respected subsidiarity and demonstrated a respect for localism in the particular case at issue. In particular, this would involve the CJEU including in its reasoning a clear justification of EU competence in this context so as to draw out the limits of EU competence. As subsidiarity in these types of cases relates to the cross border requirement, the CJEU should be explicit about departing from the purely internal rule as well as explaining the substance of rights of EU citizens.

The proportionality element of the review relates to the actual consideration and weighing up by the CJEU of the competing interests identified in this context. This requires the CJEU to identify explicitly in its reasoning any competing interests that have been weighed up as well as stating any other particular factors involved in the balancing and the weight accorded to those factors. This should include considering the financial implications and what potential impact might be on immigration for that particular Member State of ruling that particular national legislation is contrary EU law. Access to socio-economic data or discussion with the national referring court could be helpful here in informing the CJEU's consideration of this issue¹³⁵² and being more specific about 'unreasonable burden'. The CJEU has ignored Rasmussen's critique of its

¹³⁵¹ Case C-434/09 *McCarthy v Home Secretary* [2011] ECR I-0000.

¹³⁵² See also : H. Rasmussen, *On Law and Policy of the European Court of Justice* (Kluwer 1986)] Rasmussen and his conclusion that the ECJ needed to take into account more socio-economic data in its adjudication.

role in this respect, but it has all the more relevance in a subsidiarity context. Far-reaching economic effects, for example, would suggest the CJEU is intruding upon fiscal competence, which remains with the Member States. Any views of the EU institutions in this context and their reasons for favouring local law-making over centralised action should be explicitly stated. For, and as Kumm has pointed out, the advantages of local law-making over centralised action are three fold and encompass efficiency, democracy and preserving the identities of citizens of the Member State which is easier at a local level than a European level.¹³⁵³ The CJEU could be encroaching on fiscal competence of the Member States through an expansive interpretation of rights.

But on the other hand, in cases concerning a the residence rights of economically inactive EU citizens and their family members, the CJEU would also need to demonstrate that it had taken account of Article 7 of the Charter of Fundamental Rights as well as considering if the substance of an EU citizens rights had been compromised such that it does not need to consider any actual cross-border element. By explicitly including in its judgement the sector-specific criterion it had employed when weighing up such issues in citizenship cases where there are issues relating to Article 7 and the weight given by the CJEU to each criterion, this would anchor subsidiarity.

It is therefore proposed that for the CJEU to more meaningfully engage with subsidiarity and proportionality in its judicial reasoning this should include the CJEU adding the following to its reasoning:-

Firstly, in respect of the subsidiarity element of the review, what is the overall degree of competence that has been transferred to the EU in private and family life? This would include considering both the general and the specific competence and whether competence involves an internal market provision. This is an important question as the CJEU has frequently adopted an expansionary approach when approaching competence in internal market cases and as Davies writes prior to the Treaty of Lisbon, ‘Alas, as every Community lawyer knows, there could hardly be more open-ended and ambiguous competences than those

¹³⁵³ Kumm Op. Cit. 581.

assigned to the Community.’¹³⁵⁴ Furthermore, Conway writes that ‘the conceptual pull of the concept of ‘internal market’ or ‘common market’ make defining the limits of EU competence very difficult as almost any national rules on any subject can be considered an obstacle to free movement’.¹³⁵⁵

Yet following the Treaty of Lisbon, Article 5 TEU clearly defines the EU as an organization of conferred and shared powers. Craig highlights ‘the Laeken Declaration and subsequent discussion of Treaty reform was premised there were concerns voiced about ‘competence creep’, more especially in relation to two of the most general Treaty provisions, Article 95 and 308 EC’.¹³⁵⁶ However, Craig then explains that despite the Treaty of Lisbon, ‘problems still remain’ and that, ‘the Treaty of Lisbon will..... do little if anything to alleviate problems of ‘competence creep’ in the terrain covered by Article 114 TFEU (ex Article 95 TEC)’.¹³⁵⁷ This is because the limits of the internal market and the relationship between general and specific competences are not addressed in the Treaty of Lisbon.

On the other hand, Craig does point out that the new Impact Assessment strategy ‘constitutes a framework within which to address concerns as to competence anxiety’ which he concludes should make easier judicial review in that the CJEU could examine the Commission’s discussion from any Impact Assessment undertaken.¹³⁵⁸ He does however sound a note of caution when he writes ‘the Impact assessment strategy is not some panacea that will magically dispel concerns as to competence creep or competence anxiety. It is nonetheless central to addressing these concerns’.¹³⁵⁹ Nevertheless, the current author agrees with Craig that it is still an important source of evidence of justification of EU action and consideration of the level of added value of EU action.¹³⁶⁰ Furthermore, the current author also agrees with Craig that ‘if the verification or justification for EU action contained in the Impact Assessment appear merely formal, scant, or

¹³⁵⁴ Gareth Davies, *Subsidiarity: The Wrong Idea, In the Wrong Place, At the Wrong Time*, (2006) 43 Common Market Law Review, 63-84 at 65.

¹³⁵⁵ G.Conway ‘Conflicts of Competence Norms in EU Law and the Legal Reasoning of the ECJ’ 11 (9) German Law Journal at 967-1005 at 970.

¹³⁵⁶ P.Craig, (2010) *The Lisbon Treaty: Law, Politics, and Treaty Reform*, (Oxford: Oxford University Press)

¹³⁵⁷ Ibid., at 188

¹³⁵⁸ Ibid., at 191.

¹³⁵⁹ Ibid., at 191.

¹³⁶⁰ Ibid., at 191-2.

exiguous than the [CJEU] should not hesitate to so conclude, thereby indicating that the enhanced role accorded to subsidiarity in the Lisbon Treaty will be taken seriously'.¹³⁶¹ Consequently, it is vital that the CJEU needs to ensure that in performing judicial review that it rigorously reviews any relevant Impact Assessments when considering the terrain covered by Article 114 TFEU.

The CJEU also needs to consider what the minimum standards have been established under the European Convention on Human Rights on this and to include in its reasoning why it is not enough just to rely on these. Here subsidiarity can be related to the divide between international law and EU law: the CJEU needs to explain why it is not leaving human rights to the ECHR.¹³⁶² Here the CJEU could draw upon an argument by Schütze that there has been a conceptual shift of emphasis in EU federal philosophy from a dual federalism to co-operative federalism and that the latter encompasses the idea that the EU and Member States work together in a shared legal sphere.¹³⁶³ Thus when the EU accedes to the ECHR it has a duty in conjunction with the Member States to ensure compliance in the shared legal sphere with ECHR standards rather than simply leaving the matter to the ECHR court.

On the other hand, the CJEU would also need to demonstrate to the Member States' that there has been proper respect when weighing up conflicting issues to the division of power between the EU and the Member States in cases involving protecting the private and family rights of EU citizens/carers of EU citizens. By adopting such an approach the CJEU would be acting as an arbiter in this context. It would therefore need to identify the specific criteria it had relied upon when weighing up conflicting issues in this context i.e. relative to particular competences. This would help to anchor subsidiarity and help ensure the proper respect for the division of power between the EU and the Member States. Even where there is no change in case outcomes an explicit explanation of how the CJEU had considered subsidiarity in the CJEU's reasoning would help to improve

¹³⁶¹ Ibid.

¹³⁶² See further R.Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law*, (2009, OUP)

¹³⁶³ Ibid for a consideration of the federal philosophy that informs the EU's legal structure and in particular an argument of how the EU legal system has evolved from dual federalism (which encompasses the philosophical idea of dual sovereignty where both governmental bodies are co-equals) to co-operative federalism (which encompasses the philosophical idea that two governmental bodies work together in a shared legal sphere).

the quality of the reasoning of the CJEU and consequently enhance the legitimacy of the CJEU's ruling.¹³⁶⁴

Where cases involve EU citizens who are children such as in the case of *Zambrano*¹³⁶⁵, the CJEU should acknowledge in its reasoning the limits of EU competence in that,

‘the substantive family law remains under the sole competence of EU countries although the EU is empowered to take measures concerning family law with cross-border implications on the basis of a special legislative procedure: all EU countries should agree (unanimity) and the European Parliament must be consulted’.¹³⁶⁶

The anchoring of a subsidiarity and proportionality review is an important issue is an important issue to help deflect criticism of a pro-union interpretative tendency as the CJEU's case law has developed to date incrementally in a wide variety of different shared policy contexts such as free movement and family rights, social security entitlements for adults, social security entitlements for child dependents. It is very probable that other policy contexts will find their way before the CJEU when considering EU citizens rights and the CJEU will again be drawn into acting as an arbiter between fundamental rights of EU citizens and local law. There is also potential for questions to be raised in connection with EU citizens rights before the CJEU in light of existing debates that have already been raised at national level such as the debate that arose in Ireland where the national court was required to consider educational rights for disabled Irish citizens and the interpretation of Article 42.4 of the Constitution of Ireland 1937 in the case of *Sinnott v Minister for Education*.¹³⁶⁷ This raises controversial issues such as could EU law be used to require Member States to provide certain kinds of educational

¹³⁶⁴ N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.'

¹³⁶⁵ C-34/09 *Gerardo Ruiz Zambrano v Office National de L'Emploi (ONEM)*, [2011] ECR I-1177.

¹³⁶⁶ European Commission, 'Family matters and succession' <http://ec.europa.eu/justice/civil/family-matters/index_en.htm> accessed 8.2.15.

¹³⁶⁷ *Sinnott v. Minister for Education* [2001] IESC 63; [2001] 2 IR 505 (12th July, 2001) and the interpretation of Article 42.4 of the Constitution of Ireland which provides, *inter alia*, that 'the State shall provide for free primary education' and, when the public good requires it, provide other educational facilities or institutions,' in relation to the education rights for the disabled.

benefit without a strong cross-border element. More generally, the CJEU needs to be clear about the division between general internal market (i.e. competition and free movement) and specific competences otherwise the idea of distinguishing categories of competence breaks down. For example, social welfare is clearly primarily for the Member States, but the CJEU is gradually drawing aspects of it in without being explicit about the competence delimitation problem.

In respect of the proportionality element of the review, it is submitted that an important issue the CJEU needs to address in all such cases is when are the substance of rights compromised such that it does not need to consider any actual cross-border element. The CJEU needs to identify a minimum threshold although arguably the presumption must be against this being necessary in most cases, because the European Convention on Human Rights has already done this. This would involve firstly a consideration of whether it is possible to identify whether there is a minimum core of EU rights that are so sacrosanct that there is no need to consider any actual cross border element and the relationship with the European Convention on Human Rights and national constitutional traditions. The CJEU needs to do this much more systematically. Furthermore, for example as in the *Zambrano* case,¹³⁶⁸ the CJEU should have contextualised its reasoning here with a consideration of Article 7 of the Charter of the Fundamental Rights at the very least.

Secondly, in respect of considering the national measure at issue, use could be made of a test suggested by Alexy.¹³⁶⁹ He proposed that a graduated scale for national measures which contained three levels – serious, moderate and minor – could be applied when considering national measures although such an approach does run the risk of opening up more potential for judicial discretion e.g. where on the scale is the line drawn between a minor and a more serious measure.¹³⁷⁰ This would provide a clearer basis for weighing the relative importance of a particular measure.

¹³⁶⁸ C-34/09 *Gerardo Ruiz Zambrano v Office National de L'Emploi* (ONEM), [2011] ECR I-1177.

¹³⁶⁹ R.Alexy, *A Theory of constitutional Rights*, translated by J.Rivers, (OUP, 2002) 401-414. See also J. Habermas *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (1998) 259-260; K. Moller, 'Proportionality: Challenging the Critics', (2012) 10(3) *International Journal of Constitutional Law* 709 for a critique of Alexy's theory of balancing as subjective.

¹³⁷⁰ R.Alexy, *A Theory of constitutional Rights*, translated by J.Rivers, (OUP, 2002) 401-414.

Thirdly, to consider how the CJEU approaches balancing the tension between a citizens rights in a particular policy context and any legitimate objectives of the Member States in a particular context. Here, the CJEU could draw inspiration from the ECHR approach in this context and ask a series of questions about the national legislation at issue¹³⁷¹. Such questions could include asking whether there is a legitimate aim for a particular national measure and, if so, whether the particular national measure was both a necessary and proportionate way to implement that legitimate aim. It would also entail the CJEU weighing up the seriousness of the national measure at issue against the need to balance the interests of society with those of individuals and groups. In addition, and as Alexy points out, it is crucial for judges when balancing to assess the level of interference with a particular right and that where there is considerable interference that this requires the CJEU to demand good and valid reasons to justify such great interference.¹³⁷²

Finally, it would also be important for the CJEU to list the factors that it has taken into consideration when undertaking such a balancing exercise¹³⁷³ in order to provide evidence of the CJEU has considered how the substance of EU citizens rights were so compromised here so as not to need to consider any cross-border element. The relevant factors in *Zambrano* could have, for example, included discussion of the fact that here the EU citizen was a young child,¹³⁷⁴ the vulnerability of a young child and their dependence on their parents for care and the emotional ties involved between the two child EU citizens and their parents with reference to the Charter of Fundamental Rights and the UN Convention on Rights of the Child.¹³⁷⁵ The addition of such extra reasoning would have provided evidence of the CJEU considering how the substance of EU citizens rights were so compromised here so as not to need to consider any cross-border element

¹³⁷¹ See also *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*, [1999] 1 AC 69,80 where the Privy Council defined the questions generally to be asked in deciding whether a measure is proportionate are, ‘whether (1) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective’.

¹³⁷² R.Alexy, *A Theory of constitutional Rights*, translated by J.Rivers, (OUP, 2002) 401-414.

¹³⁷³ See the recent case of *Huang v Secretary of State for the Home Department Kashmiri v Secretary of State for the Home Department*, [2007] UKHL 11 at para 19-20 where the HL controversially said that the national courts should be doing the balancing here.

¹³⁷⁴ See H.Stalford, *Children and the EU*, (2012, Hart Publishing) chapter 3 for a more general discussion of protection of children’s rights to family life in EU law.

¹³⁷⁵ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, <<http://www.refworld.org/docid/3ae6b38f0.html>>accessed 15 July 2014.

By adopting a structured approach to subsidiarity and proportionality this would help ensure the proper respect for the division of power between the EU and the Member States. This would be especially important in areas where the EU is acting on the edge of its competence such as in relation to social security or immigration. Here the need for the CJEU to include a subsidiarity and proportionality review and be explicit in its reasoning of how it had considered subsidiarity, weighed up the seriousness of the national measure at issue against the need to balance the interests of society with those of individuals and groups as well as demonstrating a respect for localism by giving more weight to the Member State's right to regulate is the most compelling. This would involve the CJEU adopting a more systematic approach to competences: identifying more clearly the limits of EU competence, the importance of special competence over general competences, such as Article 114 TFEU (ex Article 95 TEC) and taking a more deferential approach to matters raising fiscal implications for Member States in order to respect the fiscal competence of the Member States. These are important considerations as the cases considered in section 2 all fall short in explaining the limits of EU law requirements, especially re the substance of rights, purely internal situations and what unreasonable burden means re financial implications.

5. Conclusion

The previous chapter 4 of this thesis focused on particular shared policy context – determining the rights of EU citizens as a lens to explore how a subsidiarity review by the CJEU could address shared competence issues. It also included explaining how despite in this particular shared policy context the introduction of EU citizenship by the Treaty of Maastricht being primarily concerned with the market rights of citizens that the CJEU has played an important role in fleshing out the meaning of citizenship and moving towards a more rights based approach to reflect the fundamental status of EU citizenship in EU law, albeit at the same time there is ambiguity in the case law about the relationship between rights and the general interests of the internal market. More recently, the fundamental status of EU citizenship has been enhanced by the giving of legal effect to a Bill of

Rights for citizens. Such a development provides fertile ground for the CJEU to draw inspiration from when reasoning in cases involving the realisation of citizenship rights for EU citizens.

On the other hand, chapter 4 also explained how EU citizenship following the Treaty of Lisbon remains parasitic on national citizenship in that in order to be an EU citizen you just first be a national of a Member State. Citizenship, therefore, is complementary, but on the approach of the CJEU it impacts on competence generally. Furthermore, EU citizenship is constrained by the limits of EU competence in areas of shared competence and subsidiarity. Respect for the latter principle, which has an inherent respect for local law-making, taken in conjunction with the national identity clause, should be a powerful constraint on the CJEU when interpreting in this area. The CJEU should also ensure that when weighing up criteria in the specific context of protecting private and family rights that it makes explicit reference to the Charter and right to respect for family life as well as taking into account any limitations which may legitimately be imposed on this right. As chapter 4 was based on normative considerations, this chapter explained how this normative approach could be applied.

In light of the wide range of potential number of policy contexts that citizenship rights could be an issue, it was submitted that an important issue the CJEU needs to address in all such cases is when are the substance of rights compromised such that it does not need to consider any actual cross-border element. This would involve firstly a consideration of whether it is possible to identify whether there is a minimum core of EU rights in relation to where a situation falls within EU law that are so sacrosanct that there is no need to consider any actual cross border element.

Secondly, in respect of considering the national measure at issue, use could be made of a test suggested by Alexy¹³⁷⁶ who proposed that a graduated scale for national measures which contained three levels – serious, moderate and minor – could be applied when considering national measures¹³⁷⁷ Alexy's test does not exhaust the problem of making value judgements about relative degrees of

¹³⁷⁶ R.Alexy, *A Theory of constitutional Rights*, translated by J.Rivers, (OUP, 2002) 401-414.

¹³⁷⁷ Ibid.

importance of different interests, but it provides a basis for a more explicit articulation, something that the CJEU tends to be quite poor at.

Thirdly, to consider how the CJEU approaches balancing the tension between a citizens rights in a particular policy context and any legitimate objectives of the Member States as well as the general interest of the internal market, and how such questions could include asking whether there is a legitimate aim for a particular national measure and, if so, whether the particular national measure was both a necessary and proportionate way to implement that legitimate aim. The CJEU needs to systematically set out the scope of shared competences and apply rights within them when the EU has exercised competence legislatively, rather than using rights as a vehicle for expanding EU competences, which it has tended to do by dropping the cross-border element. Further, the CJEU needs to relate its own attempts at rights protection to both the European Convention on Human Rights and national constitutional traditions.

Finally, it would also be important for the CJEU not only to demand good and valid reasons to justify considerable interference with a particular right when weighing this against a particular national legitimate aim but also to list the factors that it has taken into consideration when undertaking such a balancing exercise¹³⁷⁸ in order to anchor subsidiarity and proportionality and help ensure the proper respect for the division of power between the EU and the Member States. This would be especially important in areas where the EU is acting on the edge of its competence such as in relation to social security or immigration. Here the need for the CJEU to include a subsidiarity and proportionality review and be explicit in its reasoning of how it had considered subsidiarity, weighed up the seriousness of the national measure at issue against the need to balance the interests of society with those of individuals and groups as well as demonstrating a respect for localism by giving more weight to the Member State's right to regulate is the most compelling.

The sequence of how the CJEU should apply a subsidiarity and proportionality review of the CJEU is summarised as follows:-

¹³⁷⁸ See the case of *Huang v Secretary of State for the Home Department Kashmiri v Secretary of State for the Home Department*, [2007] UKHL 11 at para 19-20 where the House of Lords controversially said that the national courts should be doing the balancing here.

As subsidiarity is prior to proportionality the CJEU should include first in its reasoning in these types of cases a clear justification of EU competence in this context so as to draw out the limits of EU competence. As subsidiarity in these types of cases relates to the cross border requirement, the CJEU should be explicit about departing from the purely internal rule as well as explaining the substance of rights of EU citizens.

The proportionality element of the review relates to the actual consideration and weighing up by the CJEU of the competing interests identified in this context. This requires the CJEU to identify explicitly in its reasoning any competing interests that have been weighed up as well as stating any other particular factors involved in the balancing and the weight accorded to those factors.

In summation, therefore, the main contribution of this chapter is to argue that there is a need for the CJEU to act as an arbiter in this context and that specific criteria should be identified in order to anchor subsidiarity and proportionality and help ensure the proper respect for the division of power between the EU and the Member States. Subsidiarity can be anchored much more fully than the CJEU acknowledges.

The case for identifying what specific criteria should be identified in order to anchor a subsidiarity and proportionality review in this context is compelling.¹³⁷⁹ For such an approach would help improve the quality of the CJEU's reasoning in the context thus enhancing the legitimacy of the CJEU. It would also demonstrate to the Member States that it respects subsidiarity and localism and demonstrate its adherence to the rule of law, the latter being enshrined in Article 2 TEU. Although engaging more meaningfully with subsidiarity will not necessarily prevent the CJEU from continuing to display a pro-Union interpretative tendency especially as subsidiarity itself is a contested concept and characterised by a degree of vagueness.¹³⁸⁰ Nevertheless, even if the CJEU inevitably approaches interpretation from a certain perspective, the adoption of a subsidiarity and proportionality review would help to demonstrate the procedural legitimacy of the

¹³⁷⁹ This is necessary in order to address the incommensurability problem, which is another way of stating the problem of objectivity/subjectivity.

¹³⁸⁰ This was argued in section 5 of chapter 2.

CJEU's ruling. This would help to legitimise the CJEU's ruling to the Member States and address the problem of ultra vires EU action lacking legitimacy in the perspective of the Member States eyes.¹³⁸¹ The quality of the CJEU's reasoning is also becoming an increasingly important matter in light of the impending accession of the EU's accession to ECHR.¹³⁸² For following accession of the EU to the ECHR, the CJEU will be measured against human rights standards in its case law and does not want to be found lacking in its reasoning when balancing competing rights and interests.

¹³⁸¹ N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.'

¹³⁸² Council of Europe, Accession of the EU to the European Convention on Human Rights, <http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/default_en.asp> accessed 14.1.14. See also most recently the CJEU's opinion 2/13 Opinion 1/13 8.12.14 <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=160882&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=40247>> accessed 8.1.15 regarding the EU's accession to the European Convention on Human Rights where the CJEU has emphasised the need to preserve the autonomy of EU law when considering human rights protection.

Chapter 6 Conclusion

This thesis has explored subsidiarity and proportionality as key twin constitutional concepts in EU law for mediating the balance of power between the EU and the Member States in areas of shared competence. Its primary objective was to consider the extent to which subsidiarity as an essentially contested concept could be anchored by the CJEU in EU law when determining the residency rights of EU citizens who are economically inactive in order to enhance the legitimacy of CJEU rulings.¹³⁸³ An explicit explanation of how the CJEU had considered subsidiarity in the CJEU's reasoning in this context would help to improve the quality of the reasoning of the CJEU and consequently enhance the legitimacy of the CJEU's ruling.¹³⁸⁴

This particular type of case has been chosen as the determination of residency rights of EU citizens who are economically inactive involves an area of shared competence between the EU and the Member States. This is novel and timely research. For subsidiarity has recently been reaffirmed in the Treaty of Lisbon as a key constitutional principle of EU law to guide EU law-making in shared competence areas.¹³⁸⁵ Its use by all the EU law making institutions when law-making in shared policy areas helps to demonstrate the legitimacy of the exercise of the EU's legislative power to the Member States as well demonstrate its adherence to the rule of law,¹³⁸⁶ the latter being enshrined in Article 2 TEU.

At a theoretical level, the thesis has added to existing academic debate concerning subsidiarity by testing whether subsidiarity is a contested concept with reference to a set of conditions put forward by Gallie.¹³⁸⁷ Subsidiarity as a concept clearly

¹³⁸³ N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.'

¹³⁸⁴ N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.'

¹³⁸⁵ Article 5 TEU.

¹³⁸⁶ For further discussion see B.Tamanaha, *On the Rule of Law: History, Politics, Theory*, (Cambridge University Press, 2004).

¹³⁸⁷ W.B.Gallie, 'Essentially Contested Concepts', (1956) *Proceedings of the Aristotelian Society* 167-98.

meets the various conditions that Gallie has argued must be fulfilled in order for a concept to be deemed as an essentially contested concept,¹³⁸⁸ that it has a core meaning that can inform legal reasoning by the Court of Justice.

It was then further argued that such conceptual dissonance favours judicial discretion on how it should be applied even though as explained in chapter 3 the CJEU has made little use of it in its case law to date. This in turn raised the question of how subsidiarity, as a contested concept could be anchored in EU law by the CJEU to help ensure the proper respect for the division of power between the EU and the Member States in areas of shared competence by determining what could be agreed upon at European level. Anchoring subsidiarity by using exemplars in order to demonstrate what is nearer to the heart of subsidiarity, this helps to minimise the risk of a dispute as to how it should be operationalized in adjudication. This has the advantage of directly addressing a key concern raised by Gallie's theory that essentially contested concepts are at continual risk of being disputed as well as providing provide a useful conceptual framework in this thesis for helping to identify the core of values of subsidiarity.

On the other hand, despite the contested nature of subsidiarity there have been attempts by the EU institutions to put subsidiarity into practice by the introduction of a system of ex ante monitoring by the national Parliaments¹³⁸⁹ following the Treaty of Lisbon. The relevant provisions setting out the new ex ante monitoring role of the national Parliaments are located in several Treaty articles and one European Parliament Resolution. Firstly in Article 5 TEU the potential remit of subsidiarity monitoring is extended to include national level.¹³⁹⁰ It provides that, 'Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level'. Secondly, a new European Resolution further widens the subsidiarity monitoring to include

¹³⁸⁸ Ibid.

¹³⁸⁹ Article 12 (b) TEU provides that 'National Parliaments shall contribute actively to the good functioning of the Union [...] by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality. See also Article 7 of Protocol No 2 on the application of the principles of subsidiarity and proportionality.

¹³⁹⁰ European Parliament Resolution of 13 September 2012 on the 18th Report on better legislation – Application of the principles of subsidiarity and proportionality 2010.

regional and local levels of Member States by requiring national Parliaments to consult regional and local governmental bodies. Thirdly, Article 12b TEU, in conjunction with the Protocol on the application of subsidiarity and proportionality, sets out how the *ex ante* system for monitoring subsidiarity is to be operationalized through an early warning system. When this system is activated, the relevant instrument under review will be further scrutinised by the Commission, a group of Member States or the relevant EU institution with a view to either keeping, amending or rejecting outright with reasons a particular instrument.

The CJEU too has considered subsidiarity when considering judicial review. Chapter 3 therefore reviewed a selection of key cases where the CJEU has paid attention to subsidiarity when undertaking judicial review of EU legislative action. In all the cases examined the CJEU is progressively paying more attention to subsidiarity when reviewing EU legislative action by the EU institutions. However such review of EU legislative action by the CJEU is invariably light touch, with the CJEU frequently employing a very cursory approach to its examination of the EU institutions' decision that harmonizing legislation is required. The CJEU, displaying a pro-union interpretative tendency, relates subsidiarity to the idea of the internal market and treats advancement of the internal market as an end in itself, which is bound to neutralise subsidiarity. In the cases selected, the judgments of the CJEU are also characterized by a formalistic approach when considering if the EU institutions have paid proper attention to subsidiarity, with little consideration of the substantive evidence that Union harmonization is needed.

Adopting a doctrinal perspective, the thesis then added to this existing scholarship in chapter 3 by agreeing with and developing, in light of the Treaty of Lisbon, an argument by de Búrca that as the CJEU is a law-making institution¹³⁹¹ it is bound by subsidiarity when interpreting in shared areas of competence. In particular, it proposed that following the Treaty of Lisbon and in conjunction with the national identity clause and the Preamble and Article 1 of the revised TEU, which further emphasise that decisions regarding EU law-making are taken as closely as

¹³⁹¹ For discussion of the role of the CJEU as a law-maker see for example P.Neill, *The European Court of Justice: A Case Study in Judicial Activism*, (London: European Policy Forum, 1995) at 2; T.Hartley, 'The European Court, Judicial Objectivity and the Constitution of the European Union', (1996) 11 2 Law Quarterly Review 411-423;

possible to the citizens of Europe, there is now an even greater need for the CJEU¹³⁹² to utilise subsidiarity in its interpretation of shared policy areas in order to improve the quality of the reasoning of the CJEU and consequently enhance the legitimacy of the CJEU's ruling.¹³⁹³

The existing light touch approach of the CJEU to subsidiarity in this context is problematic as not only is such an approach not fully consistent with the principle of conferral, it also demonstrates the CJEU adopting a pro-union interpretative tendency in its interpretation of shared policy areas.

The thesis also has added to existing scholarship in chapter 3 by considering how Kumm treats proportionality as the third aspect of competence and how the CJEU could operationalize subsidiarity through developing a proposal by Kumm of how the CJEU could employ subsidiarity and proportionality as an aspect of subsidiarity applied to competences as a tool of judicial review. This includes considering whether there is a single test in different areas or can more sector-specific criteria be identified especially where there are policy areas which already involve the CJEU considering other competing interests or EU law concepts that are essentially contested such as EU citizenship. In particular, it was argued that as each policy area has different financial and symbolic considerations that the CJEU needs to identify the sector specific criteria for each policy area in addition to considering the degree of transfer of competence in specific areas.

Chapter 4 then pointed out that the reasoning in the CJEU cases selected for examination concerning the residency rights of EU citizens reveal a pro-union interpretative tendency and a failure of the CJEU to undertake a subsidiarity and proportionality review. It was then proposed that a subsidiarity /proportionality review by the CJEU could be useful/helpful here. On one hand, such a subsidiarity and proportionality review would enable the CJEU to operationalize subsidiarity's inherent respect for localism in its reasoning in this context and

¹³⁹² For a discussion of the role of the CJEU and European legal integration see for example J.Bengoetxea, N. MacCormick, and L.Moral Soriano, 'Integration and Integrity in the Legal Reasoning of the European Court of Justice' in de Búrca, G. and Weiler, J.H.H. (eds) *The European Court of Justice* (Oxford: Oxford University Press, 2001), pp. 43- 86; M.Cappelletti, M.Secombe, J.H.H.Weiler, *Integration through Law: European and the American Federal Experience: Vol 1: Methods, Tools and Institutions* (Berlin/New York: Walter de Gruyter, 1985) 86.

¹³⁹³ N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.'

provide evidence of the need to respect for Member State regulatory regimes. An explicit explanation of how the CJEU had considered subsidiarity in the CJEU's reasoning would also help to improve the quality of the reasoning of the CJEU and consequently enhance the legitimacy of the CJEU's ruling.¹³⁹⁴

But on the other hand, when the CJEU when undertaking a subsidiarity and proportionality review applied to competences and then scrutinises aspects of Member State regulatory regimes which also concern fundamental rights it could also act as an arbiter between respect for Member States law and protecting the residence rights of EU citizens with reference to the Charter of Fundamental Rights. This is to examine the competence of the CJEU and its institutional placing at a supranational level as suited to adjudication of citizenship residency rights.

It was then contended that as a minimum that the CJEU should firstly explicitly address competence issues in its reasoning in every case in this context. For this could help to counter claims that the CJEU displays an unjustified emphasis in its case law on the need to pursue an 'ever closer Union' which deprives Member States of their competencies and is at the expense of the legal systems of the Member States.¹³⁹⁵ It would also be consistent with subsidiarity and its inherent respect for localism in conjunction with the national identity clause in Article 4 (2) TEU. For this provision provides that ,

'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and

¹³⁹⁴ N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.'

¹³⁹⁵ N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308.

safeguarding national security. In particular, national security remains the sole responsibility of each Member State'.¹³⁹⁶

The question of competence is especially important in the undertaking of any subsidiarity and proportionality review as the EU is bound by the principle of conferral which denotes a system where the EU institutions can exercise only competence attributed to it.¹³⁹⁷ Where the EU is dealing with shared competence this is provided for in Article 2 (2) TFEU. This provides that 'the Member States shall exercise their competence to the extent that the Union has not exercised its competence'. As Schütze outlines following the Treaty of Lisbon, these shared competences 'remain the ordinary competences of the European Union unless the Treaties expressly provide otherwise, an EU competence will be shared.'¹³⁹⁸ On the other hand, where the EU is on the edge of its competence, the EU can only have responsibility for its actions on the basis of a valid competence to carry them out, under the rules of attribution of responsibility in international law.¹³⁹⁹

Secondly, it was contended that in undertaking any subsidiarity and proportionality review the criteria used by the CJEU in a balancing test should be sector specific and therefore particular criteria needed to be identified when the CJEU is dealing with cases involving the residency rights of EU citizens. Some areas need particular sensitivity because of their financial implications or their symbolic importance for the Member States or because they are close to matters where the CJEU has merely complementary competence. As a supranational court primarily experienced in matters of European integration and frequently in the past displaying a pro-union interpretative tendency¹⁴⁰⁰, this role will inevitably take the CJEU out of its comfort zone and straying into issues that have either been the preserve of national constitutional courts at a national level or fundamental human rights at an international level. This is particularly so in the

¹³⁹⁶ For further discussion of the identity clause see D.Leczykiewicz, 'The national identity clause in the EU Treaty: a blow to supremacy of Union law?', <http://ukconstitutionallaw.org/2012/06/21/dorota-leczykiewicz-the-national-identity-clause-in-the-eu-treaty-a-blow-to-supremacy-of-union-law/>> accessed 10.5.13

¹³⁹⁷ Article 2 TFEU.

¹³⁹⁸ R.Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law*, (2009, OUP) at 5.

¹³⁹⁹ International Law Commission, Draft articles on the law of Treaties between States and International Organisations or between international organisations with commentaries, (1982). For<http://legal.un.org/ilc/texts/instruments/english/commentaries/1_2_1982.pdf> last accessed 29.1.14.

¹⁴⁰⁰ This was argued in section 5 of chapter 2.

context of EU citizenship as EU citizenship is not a shared competence but the rights associated with EU citizenship can be related to different categories of competence.

In respect of subsidiarity, this latter article contains the principle that the CJEU as an EU law-making institutions is required to demonstrate that not only is there a need for legislation at a supranational level but that there are distinct advantages of legislative action at a supranational level over and above Member State legislative action or inaction at a national level. With regard to proportionality, this too is concerned with the appropriate means to achieve a need but unlike subsidiarity it is concerned with how competence is exercised rather than the EU legislative institutional process of determining the level for exercise of competence.

Together, subsidiarity and proportionality must comply with a key tenet of the rule of law, the requirement of formal legality.¹⁴⁰¹ Chapters 4 and 5 then focus on one specific shared policy area – the residency rights of EU citizens who are economically inactive -. Furthermore, that in respect of any subsidiarity and proportionality review undertaken by the CJEU, this should at the very least involve the CJEU making explicit reference in its reasoning to, on the one hand, how it had identified limits to the competences through subsidiarity analysis in any particular case. Furthermore, the CJEU also should include in its reasoning considering the financial implications and what potential impact might be on immigration for that particular Member State of ruling that particular national legislation is contrary EU law. Access to socio-economic data or discussion with the national referring court could be helpful here in informing the CJEU's consideration of this issue.¹⁴⁰² The CJEU has ignored Rasmussen's critique of its role in this respect, but it has all the more relevance in a subsidiarity context. Any views of the EU institutions in this context and their reasons for favouring local law-making over centralised action should be explicitly stated. For, and as Kumm has pointed out, the advantages of local law-making over centralised action are three fold and encompass efficiency, democracy and preserving the identities of

¹⁴⁰¹ J. Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?', (2002) 21(2) *Law and Philosophy* 154-5.

¹⁴⁰² See also Rasmussen's conclusion that the CJEU needs to take into account more socio-economic data in its adjudication: H. Rasmussen, *On Law and Policy of the European Court of Justice*, (Kluwer, 1986)]

citizens of the Member State which is easier at a local level than a European level.¹⁴⁰³

By explicitly including in its judgement the sector-specific criterion it had employed when weighing up such issues in citizenship cases where there are issues relating to the Charter and the weight given by the CJEU to each criterion, this would anchor subsidiarity. By adopting such an approach the CJEU would be acting as an arbiter in this context in issues that could be considered political, but it would establish its legitimacy by developing a more coherent and specified framework for identifying the boundaries of competences. Citizenship is an inherently political concept.

The thesis then concluded with a case study in chapter 5 which developed a normative approach (as the critique in chapter 4 is based on normative considerations) and explored how a subsidiarity review could be anchored in EU law to address competence issues when the CJEU is considering fundamental principles of EU law and residency rights of EU citizens who are economically inactive. In particular, it was pointed out that in light of the wide range of potential number of policy contexts that citizenship rights could be an issue that an important issue the CJEU needs to address in all such cases is when the substance of rights is compromised such that it does not need to consider any actual cross-border element. This would involve firstly a consideration by the CJEU of whether it is possible to identify whether there is a hierarchy of minimum core of EU rights, such as the prohibition of torture¹⁴⁰⁴ or the right to liberty and security of the person¹⁴⁰⁵ that are so sacrosanct that there is no need to consider any actual cross border element.

Secondly, in respect of considering the national measure at issue, use could be made of a test suggested by Alexy.¹⁴⁰⁶ He proposed that a graduated scale for

¹⁴⁰³ Kumm Op. Cit. 581.

¹⁴⁰⁴ Article 4 of the Charter of Fundamental Rights.

¹⁴⁰⁵ Article 6 of the Charter of Fundamental Rights. See also in the UK para 39 of the Magna Carta which provides 39 that 'No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land'.

¹⁴⁰⁶ R.Alexy, *A Theory of constitutional Rights*, translated by J.Rivers, (OUP, 2002) 401-414. See also J. Habermas *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (1998) 259-260; K. Moller, 'Proportionality: Challenging the Critics', (2012) 10(3) International Journal of Constitutional Law 709 for a critique of Alexy's theory of balancing as subjective.

national measures which contained three levels – serious, moderate and minor – could be applied when considering national measures¹⁴⁰⁷ although such an approach does run the risk of opening up more potential for judicial discretion e.g. where on the scale is the line drawn between a minor and a more serious measure.¹⁴⁰⁸ Nonetheless, it makes the reasoning more explicit and thus transparent and open to scrutiny.

Thirdly, that the CJEU when balancing the tension between citizens' rights in a particular policy context and any legitimate objectives of the Member States could draw inspiration from the ECHR approach and ask a series of questions about the legitimacy and necessity of the aim of the national legislation at issue as well as the proportionality of the implementation of that aim¹⁴⁰⁹. It would also entail the CJEU weighing up the seriousness of the national measure at issue against the need to balance the interests of society with those of individuals and groups. For as Alexy points out, it is crucial for judges when balancing to assess the level of interference with a particular right and that where there is considerable interference that this requires any court to demand good and valid reasons to justify such great interference.¹⁴¹⁰ In the context of the CJEU and determining what kind of substantive reasons are within the legitimate scope of the CJEU reasoning when balancing a fundamental right, such as the exercise of freedom of expression against the fundamental freedom of movement of goods, the CJEU has already in the case of *Schmidberger* took the following kind of substantive reasons into account. Firstly, the interference with free movement of goods had taken place following a request for authorisation for such interference to the Austrian authorities and after the Austrian authorities had decided not to ban the demonstration.¹⁴¹¹ Secondly, on the grounds that the demonstration took place only once, on a single route and for a limited time unlike in the *Commission v France* case where there had been serious disruption over a period of time.

¹⁴⁰⁷ R.Alexy, *A Theory of constitutional Rights*, translated by J.Rivers, (OUP, 2002) 401-414 at 402 and who cites for example of 'the duty of tobacco producers to place health warnings about the dangers of smoking on their products is a relatively minor interference with freedom of profession. By contrast, a total ban on all tobacco products would be a serious interference'.

¹⁴⁰⁸ Ibid.

¹⁴⁰⁹ See also *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*, [1999] 1 AC 69,80 where the Privy Council defined the questions generally to be asked in deciding whether a measure is proportionate are, 'whether (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective'.

¹⁴¹⁰ R.Alexy, *A Theory of constitutional Rights*, translated by J.Rivers, (OUP, 2002) 401-414.

¹⁴¹¹ Case 112/ 00 *Schmidberger* [2003] ECR I-5659 (CJEU) para 84.

Thirdly, that the Austrian citizens' purpose here was in exercising their right to freedom of expression rather than to restrict the free movement of goods as in the *Commission v France* case where the French farmers were seeking to obstruct the free movement of goods.¹⁴¹² Fourthly, that the Austrian authorities had taken steps to mitigate the disruption by putting in place various administrative and supporting measures.¹⁴¹³ Thus in this case we see the CJEU actually performing a proportionality review and balancing the interests involved in order to assess whether the right balance had been achieved even though in practice Jans argues the CJEU generally does not carry out the balancing.¹⁴¹⁴ Ultimately, any balancing of fundamental rights involving human rights might involve the CJEU deferring to the European Court of Human Rights in human rights matters once the EU accedes to the ECHR.¹⁴¹⁵

Fourthly, it was highlighted how it is important for the CJEU in its reasoning to list the factors that it has taken into consideration when undertaking such a balancing exercise¹⁴¹⁶ in order to anchor subsidiarity and proportionality and to demonstrate that its decision is not arbitrary. Such an approach would also help to demonstrate to the Member States a proper respect for both the rule of law and the division of power between the EU and the Member States. This would be especially important in areas where the EU is acting on the edge of its competence such as in relation to the residency rights of EU citizens where the EU citizens are economically inactive and which could have significant financial or fiscal implications for the Member State concerned or significant human rights implications for the deportation of vulnerable EU citizens.

In summation, it is hoped that the research in this thesis of how the CJEU could utilise subsidiarity to justify its reasoning in cases in this context will convince sceptics of the need of the CJEU to utilise subsidiarity to justify its interpretation in this context. An explicit explanation of how the CJEU had considered subsidiarity in the CJEU's reasoning would help to improve the quality of the reasoning of the CJEU and consequently enhance the legitimacy of the CJEU's

¹⁴¹² Ibid., para 86

¹⁴¹³ Ibid., para 87.

¹⁴¹⁴ Jans Op.Cit. at 248.

¹⁴¹⁵ Council of Europe, Accession of the EU to the European Convention on Human Rights, <http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/default_en.asp> accessed 14.1.14.

¹⁴¹⁶ See the recent case of *Huang v Secretary of State for the Home Department* *Kashmiri v Secretary of State for the Home Department*, [2007] UKHL 11 at para 19-20 where the HL controversially said that the national courts should be doing the balancing here.

ruling.¹⁴¹⁷ More importantly, however, this research provides a structured approach of how subsidiarity, which is an essentially contested concept, could be anchored by the CJEU so as to ensure a proper respect for rule of law when undertaking a subsidiarity and proportionality review applied to competences when determining the residency rights of EU citizens. Subsidiarity, despite its political context, can be a justiciable tool when a satisfactory conceptual framework is developed to support it.

¹⁴¹⁷ N.Everling, 'The ECJ as a Decision Making Authority' (1992) 82 *Michigan Law Review*, 1294 at 1308 and who points out how courts create their own legitimacy by the quality of their decisions.'

APPENDIX 1 TABLE OF TREATIES, INSTRUMENTS AND LEGISLATION

INTERNATIONAL TREATIES AND CONVENTIONS

European Convention on Human Rights (ECHR) 1950 European Treaty Series No. 05

United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 United Nations, Treaty Series 3

Maternity Protection Convention, 2000 (International Labour Organisation, No. 183)

United Nations Convention for the Elimination of all forms of Discrimination against Women (CEDAW) 1979

Vienna Convention on the Law of the Treaties 1969 1155 United Nations, Treaty Series 331

UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p.3.

EUROPEAN TREATIES AND LEGAL INSTRUMENTS

EU Institutional agreements

Inter-institutional Agreement of 1993 between the Council, the Parliament and the Commission on procedures for implementing the principle of subsidiarity [2003] C 321/01

EU Treaties

European Economic Community Treaty (Treaty of Rome) 1956

Treaty on European Union (Maastricht Treaty) [1992] OJ C 190/1.

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C 306/1.

Consolidated version of the Treaty on the Functioning of the European Union [2010]

OJ C 83/47.

Charter of Fundamental Rights of the European Union [2010] OJ C 83/02

Protocols

Protocol (No. 1) on the Role of National Parliaments in the European Union [2010]

OJ C 83, 30.03.2010, p.203

Protocol (No. 2) on the Application of the Principles of Subsidiarity and

Proportionality [2010] OJ C 83, 30.03.2010, p. 206

Protocol (No 3) on the Statute of the Court of Justice of the European Union [2010] OJ C

83, 30.3.2010, p.210

Protocol (No 8) on Human Rights and Fundamental Freedoms, [2010] OJ C 83, 30.3.2010, p.273

Protocol (No 25) on the exercise of shared competence, [2010], OJ C 83, 30.3.2010, p. 307

Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, [2010] OJ C 83, 30.3.2010, p.313

EU SECONDARY LEGISLATION

EU Regulations

Regulation 492/11 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, OJ L 141 05.04.2011

EU Directives

Council Directive 75/117/EEC on the approximation of the laws of the member states relating to the application of the principle of equal pay for men and women, OJ L 45/19 1975.

Council Directive 76/207/EEC of 10 February 1975 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions OJ L 39/40 1976, as amended by Directive 2002/73, OJ L 269/15 2002

Council Directive 90/364/EEC of 28 June 1990 on the right of residence [1990] OJ L 180/26;

Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity [1990] OJ L 180/28
Council Directive 92/85 of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at

work of pregnant workers and workers who have recently given birth or are breastfeeding, OJ L 348/1 1992.

Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students [1993] OJ L 317/59

Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time, OJ [1993] L307/18

Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions OJ 1998 L 213, p. 13

Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ 2004 L 16/44 as amended by Directive 2001/51, OJ 2011 L 123/1

Council Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77

Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications [2005] OJ L 255, 30.9.2005, 22

APPENDIX 2 TABLE OF CASES (in alphabetical order)

Court of Justice of the European Union cases

Case C-218/98 *Abdoulaye and others v Renault* [1999] IRLR 811

Case C-142/05, *Åklagaren v. Percy Mickelsson and Joakim Roos (Mickelsson)*, [2009] ECR I-427

Case C-109 *Roca Álvarez*, 30 Sept 2010 ECR [2010] 1-08661.

Case 26/62 *NV Algemene transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

Case T-45/90, *Alicia Speybrouck v European Parliament*, [1002] ECR II 33

Case C-109/01 *Akrich*, [2003] ECR I-9607

Case C-262/88 *Barber v GRE* [1990] ECR I-1889

Case 170/84 *Bilka-Kaufhaus GmbH v Karin Weber von Hartz* [1986] ECR 1607

Case C-127/08 *Blaise Baheten Metock & Others v Minister for Justice, Equality and Law Reform (Metock & Others)*, 3 CKLR 39 (2008)

Case C-415/93 *Bosman* [1995] ECR I-4921.

Case 30/77, *Bouchereau* [1977] 2 CMLR 800 Case C-411/96 *Boyle v EOC* [1998] ECR I-6041

Cases C-73, *Bressol v Gouvernement de la communauté Française* [2010] 3 CMLR 20

Case C-491/01, *British American the Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial tobacco Ltd*, 2002 ECR I-11453

Case C-381/99 *Brunnhöfer v Bank der österreichischen Postsparkasse AG* [2001] ECR I-4961

Case C-60/00 *Carpenter* [2002] ECR I-6279

Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, [1982] ECR 3415

Case C-148/02 *Carlos Garcia Avello v Etat Belge* [2003] ECR I-11613

Case C-303/06 *Coleman v Attridge Law*, [2008] ECR I-5603

Case C-138/02, *Collins* [2004] ECR I-2703.

C-147/03 *Commission of the European Communities v Austria* [2006] 3 CMLR 39

Case 265/95 *Commission v. France* [1997] ECR I-6959 (CJEU)

Case 22/50 *Commission v Council (Re European Road Transport Agreement) (ERTA)* 1971 ECR 263

Case C-441/02 *Commission v Germany* [2006] ECR I-3449

Case C-110/05, *Commission v. Italian Republic (Trailers)*, [2009] ECR I-519

Case 163/82 *Commission v Italy* [1983] ECR 3273

Case C-233/94 *Germany v Parliament and Council*, [1997] ECR I-2405 22-28 (Deposit Guarantees case)

Case C-157/03 *Commission v Spain* [2005] ECR I-2911

Case C-503/03 *Commission v Spain* [2006] ECR I-1097

Case C-185/97 *Coote v Granada Hospitality Ltd* [1998] ECR I-5199

Case C-169/91 *Council of the City of Stoke-on-Trent and Norwich City Council v B and Q PIC* [1992] ECR I-6635

Case C-333/13 *Dano v Jobcenter Leipzig*

Case 80/70 *Defrenne (No I) v SABENA* [1971] ECR 445

Case 43/75 *Defrenne v Sabena (Defrenne II)*, [1976] ECR 455

Case 149/77 *Defrenne (No III)* [1978] ECR 1365

Case C-177/88, *Dekker v Stichting Vormingscentrum voor Jong Volwassen Plus* [1990] ECR I-3941

Case 12/86 *Demirel v Stadt Schwabisch Gmünd* [1987] ECR 3719

Case C-256/11 *Dereci and others v Bundesministerium für Inneres*, [2011] ECR I-0000

Case C-180/95 *Draehmpaehl v Urania Immobilienservice* [1997] ECR I-2195

Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585

Case C-291/05 *Eind* [2007] ECR I-0000

C-158/07 *Forster v Hoofddirectie van de Informatie Beheer Groep* [2009] 1 CMLR 32

Case C-518/08, *Fundacion Gala-Salvador Dali*, judgement of the Court (Third Chamber of 15 April 2010

Cases C-6/90 and C-9/90 *Francovich and Others v Italian State* [1991] ECR I - 5357

Case 9/70, *Franz Grad v Finanzamt Traunstein*, [1970] ECR 825

C-34/09 *Gerardo Ruiz Zambrano v Office National de L'Emploi (ONEM)*, [2011] ECR I-1177

Case C-233/94 *Germany v EP and Council*, [1997] ECR I-2427

Case C-233/94 *Germany v Parliament and Council*, [1997] ECR I-2405 22-28 (Deposit Guarantees case)

Case C-376/98 *Germany v Parliament and Council (Tobacco Advertising case)*

Case 1/95 *H. Gerster v Freistaat Bayern* [1997] ECR I-5253

Case C-342/93 *Gillespie v Northern Health and Social Services Boards* [1996] ECR I-475

Case C-184/99, *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, [2001] CECR I-6193

C-524/06 *Huber v Germany* [2009] 1 CMLR 49

Case 11/70 *Internationale Handelsgesellschaft mBH v Einfuhr und vorratsstelle für Getreide und Futtermittel*

C 399/09 *Landtova* 22 June 2011 nyr

Case C-145/09, *Land Baden- Württemberg v Panagiotis Tsakouridis*

Case 294/93, *Les Verts v Parliament* [1986] ECR 1339

Case C-249/96 *Lisa Jacqueline Grant v South-West Trains Ltd* [1998] ECR I-621

Case C-159/90, *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others*.

Case 109/188 *Handels-og Kont funktionaerernes Forbund I Danmark v Dansk Arbejdsg-iverforening acting on behalf of Danfoss* [1989] ECR 3100.

Case C-405/95 *Hellmut Marschall v Land Nordrhein-Westfalen* [1997] ECR I- 6363

Case C-243/93 *Hill v Stapleton* [1998] ECR I-3779

Case 184/83 *Hofmann v Barmer Ersatzkasse* [1984] ECR 3047

Case C 208/09 22 December 2010, *Ilionka Sayn-wittgenstein v Landeshauptmann von Wien*

Case 96/80 *Jenkins v Kingsgate (Clothing Productions) Ltd* [1981] ECR 911

Case 222/84, *Johnston v Chief Constable of the RUC*, [1986] ECR 1651.

Case C-322/98 *Kachelmann v Bankhaus Hermann Lampe KG* [2000] ECR I-750

Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649 220

Case C-450/93 *Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051

Case C-450/93 *Kalanke v Stadt Bremen* [1995] ECR I-3051

C-292/97 *Karlsson* [2000] ECR I-2737

Case C-224/01, *Köbler v Republik Österreich* [2003] ECR I-10239

C-299/95 *Kremzow v Austria* [1997] ECR I-2629

Case 341/05, *Laval un Partneri Ptd v. v Svenska Byggnadsarbetareförbundet et al.*, 2007 ECR I-5751

Joined Cases 286/82 and 26/83, *Luisi and Carbone V Ministero del Tesoro* [1984] ECR 377

Case C-282/10 *Marible Dominguez v Centre informatique du Centre Quest Atlantique and Prefet de la region Centre*

Case C-434/09 *McCarthy v Home Secretary* [2011] ECR I-0000.

Case -129/79 *MacCarthy Ltd v Smith* [1980] ECR 1275

Case C-282/10 *Marible Dominguez v Centre informatique du Centre Quest Atlantique and Prefet de la region Centre*

Case C-409/95 *Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363

Case 152/84, *Marshall v Southampton and South West Hampshire Area Health Authority (teaching)* [1986] ECR 723

Case C-85/96 *María Martínez Sala v Freistaat Bayern* [1998] ECR I-2691

Case C-222/91 *Molenbroek v Bestuur van de Sociale Verzekeringsbank*, [1992] ECR I-5943

C-127/08 *Metock and others v Minister for Justice, Equality and Law Reform*

Case C-459/99 *MRAX* [2002] ECR I-6591

Case C-317/93 *Nolte v Landesversicherungsanstalt Hannover* [1996] IRLR 225

C-470/04 *N V Inspecteur van de Belastingdienst Oost/Kantoor Almelo* [2006] 3 CMLR 49

Joined Cases C 356/11 and C 357/11 / Judgment - *O, S v Maahanmuuttovirasto (C-356/11)*, and *Maahanmuuttovirasto v L (C-357/11)*

Case C-220/02 *Osterreichischer Gewerkschaftsbund, Gewerkschaft der Privatangestellten v Wirtschaftskammer Osterreich* [2004] ECR I-5907

Case C-491/01, *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd.* [2002] ECR I-111453

Case C-192/99, *The Queen v Secretary of State for the Home Department, ex parte Manjit Kaur*

Case C-377/98, *Netherlands v Parliament and Council*, 2001 ECR I-7079

Case C-393/10, *O'Brien v Ministry of Justice*

Case 348/09, *P.I. v Oberburgemeisterin der Stadt Remscheid*

C-209/10, *Post Danmark*

Case 280/94 *Posthuma-van Damme v Bestuur van Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen and Ostürk v Bestuar van de Nieuwe Algemene Bedrijfsvereniging* [1996] ECR I-179

Case 8/74 *Procureur du Roi v Dassonville* [1974] 2 CMLR 436

Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143

Case 120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649

Case C-135/08, [2010] ECR I-1449 *Rottmann*

Case C-184/99 *Rudy Grzelczyk v Centre public d'Aide sociale d'Ottignies-Louvain-La-Newve*, [2001] ECR i-06193

C-Case 102/88 *Ruzius-Wilbrink v Bestuur van de Bedrrijsvereniging voor Overheidsdiensten* [1989] ECR 4311

Case 112/ 00 *Schmidberger* [2003] ECR I-5659 (CJEU)

Joined Cases C-350/06 and C-520/*Schultz-Hoff and Others* 06 [2009] ECR I-179

Case C-50/96 *Schroder* (2000) ECR I-743

Joined Cases C-350/06 and C-520/06, *Schultz-Hoff and Others*, [2009] ECR I-179

Case C-210/03. *Swedish Match AB and Swedish Match UK Ltd. v. Secretary of State for Health*

C-192/05 *Tas-Hagen v Raadskamer WUBO van de Pensioen-en Uitkeringsraad* [2007] 1 CMLR 23

T-135/96, *UEAPME v Council* [1998] ECR II-2335

Case C-84/94 *UK v Council* [1996] ECR I-5755

Joined Cases 177 and 178/82 *van de Haar and Kaveka de Meern*, [1984] ECR 1797

Case 41/74, *Van Duyn v Home Office*, [1974] ECR 1337

Case C14/83 *Von Colson and Kaamann v Land Nord Rhein-Westfalen* [1984] ECR 1891

Case 5/86 *Wachauf v Germany*, [1989] ECR 2609.

Case 221/81 *Wolf* [1982] ECR 3681

Case C-40/11 *Yoshikazu Iida*

Case C-149/10 *Zoi Chatzi v Ipourgos Ikonomikon*, 16 September 2010

UK cases

AXA General Insurance Limited and others (Appellants) v the Lord Advocate and Others (respondents) (Scotland), [2011] UKSC 46

Associated Provincial Picture Houses v. Wednesbury Corporation [\[1947\] EWCA Civ 1](#), [1948] 1 K.B. 223, Court of Appeal (England and Wales).

Bank Mellat v Her Majesty's Treasury (No 2) 3 WLR 170, [2013] UKSC 39

De Belin v Eversheds Legal Services Ltd [2011] All ER (D) 16 (May)

Huang (FC) (Respondent) v Secretary of State for the Home Department (Appellant) and Kasmiri (FC) (Appellant) Secretary of State for the Home Department (Respondent) Conjoined Appeals (2007) UKHL 11

Ilia and Appeal Court in Athens, [2015] England and Wales High Court (Admin)

Miranda v Secretary of State for the Home Department, [2014] EWHC 255 (Admin).

Pham v Secretary of State for the Home Department [2015] UKSC 19
Quilla, [2011] UKSC

R (on the application of Daly) v Secretary of State for the Home Department [2001] UKHL 26; [2001] 2 A.C.532

R (Samaroo) v SSHD [\[2001\] EWCA Civ 1139](#); UKHRR 150 and *Smith & Ors v Secretary of State for Trade and Industry* [\[2007\] EWHC 1013 \(Admin\)](#)

Secretary of State for Employment v Clark [1997] 1 C.M.L.R. 613; [1997] I.C.R. 64; [1996] I.R.L.R.578; Times, May 24, 1996

US cases

Grigs v Duke Power Co, (1971) 410 U.S. 424

McGee v Attorney General (1974) IR 284

Roe v Wade (1973) 410 US 113

United Papermakers and Papermakers v United States, (1970) 397 U.S. 919

Washington v Davis, (1976) 406 U.W. 229

German cases

Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 11, 1958, 7

ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE]

ECHR cases

Gillan and Quintan v UK [2010] ECHR 28

Loizidou v Turkey, (1995) ECHR 10

Thlimmenos v Greece (2001) 31 ECHR 15

Von Hannover v Germany (2004) 40 ECHR 1

APPENDIX 3 Bibliography

A

Alexy, R., *A Theory of Constitutional Rights*, (New York: Oxford University Press, 2002)

Alexy, R., 'Formal principles: Some Replies to the Critics', (2014) 12(3) *International Journal of Constitutional Law* 511-524

Allen, P.K., *Establishing the Supremacy of European Law* (OUP, 2000)

Alston, P., (ed.) *The EU and Human Rights*, (OUP, NY, 1995)

Alter, K., 'Who are the Masters of the Treaty? European Governments and the European Court of Justice', (1998) 52 *International Organization* 121-147

D.Arcarazo, 'Civic Citizenship Reintroduced? The Long-Term Residence Directive as a Post-National Form of Membership', 21(2) (2015) *European Law Journal* 200-219

Arcarazo, D., and Murphy, C., *EU Security and Justice Law after Lisbon and Stockholm*, (Hart Publishing, 2014)

Arena, A., 'The Doctrine of Union Preemption in the EU Single Market: Between Sein and Sollen', Jean Monnet Working Paper 3/10

Aristotle, *Politics* (Penguin Books, 1981)

Aristotle, *Ethica Nicomachea* V3 1131 a-1131 b (W. Ross Trans 1925)

Armstrong, K. A., 'Legal Integration: Theorizing the Legal Dimension of European Integration', (1998) 36(2) *Journal of Common Market Studies*, 155-174

Arnall, A., *The European Union and its Court of Justice*, (Oxford, Oxford University Press, 1999)

Arnall, A., *The European Union and its Court of Justice*, (OUP, 2006)

Arnall, A., 'The European Court, Judicial Objectivity and the Constitution of the European Union, A Reply to Professor Hartley', (1996) 112 *Law Quarterly Review* 412

Aroney, N., 'Subsidiarity, Federalism and the Best Constitution: Thomas Aquinas on City, Province and Empire', (2007) 26 *Law and Philosophy* 161-228,

B

Backer, 'Harmonization, subsidiarity and cultural difference: An essay on the dynamics of opposition within federative and international legal systems', (1997) 4 *Tulsa Journal of Comparative and International Law* 185

Barak, B., 'Proportionality and Principled Balancing', (2010) 4 *Law and Ethics of Human Rights*

Barber, N.W., 'The limited Modesty of Subsidiarity', (2005) 11 (3) *European Law Review* 308-235

Barnard, B., 'Equality and Discrimination' in Davies et al *European Community Labour Law: Principles and Perspectives: Liber Amicorum Lord Wedderburn of Charlton* (Clarendon Press, Oxford, 1994) 237-259

Barnard, C., *EC Employment Law*. 2nd Edition. (Oxford, Oxford University Press, 2000).

Barnard, C., 'The Economic Objectives of Article 119' in: Hervey T and O'Keefe D (Eds) , *Sex Equality in the European Union*, (New York, Wiley, 1996)

Barnard, C., *EC Employment Law*, (OUP 3rd edition, 2006)

Beck, G., *The Legal Reasoning of the Court of Justice of the EU*, (Hart Publishing 2012)

Beck, G., 'The Mythology of Human Rights', (2008), 21 (3) *Ratio Juris* 312-47

Beck, G., 'Pluralism and Human Rights Adjudication', (2008) <http://thomasmoreinstitute.org.uk/papers/pluralism-in-human-rights-adjudication/> accessed 12.4.15

Belavusau, U., 'The Case of *Laval* in the Context of the Post-Enlargement EC Law Development', 2008 9(12) *German Law Journal* 2279-2308

Bengoetxea J. *The Legal Reasoning of the ECJ*. (Oxford, Oxford University Press, 1993)

Bengoetxea, J., MacCormick N., and Moral Soriano L. 'Integration and Integrity in the Legal Reasoning of the European Court of Justice' in de Búrca, G. and Weiler, J.H.H. (eds) *The European Court of Justice* (Oxford: Oxford University Press, 2001)

Berman, G., 'Taking Subsidiarity seriously: Federalism in the European Community and the United States', (1994) 94 (2) *Columbia Law Review* 335

Better Lawmaking 2000, COM (2000) 772 final

Betten, L and Grief, N., *EU law and Human Rights*, (European Law Series, Longman, 1998)

Beveridge report (1942) HMSO CMND 6404

Bielskis, Dr A., 'What can the Philosophes of European integration learn from post modern Aristolelianism' <<http://www.londonmet.ac.uk> > accessed 1 June 2010

Lord Bingham, *The Rule of Law*, (Penguin, 2011)

Bogumdy, A., 'Founding Principles of EU law: A theoretical and Doctrinal Sketch', (2010)

Bosnich, D., in 'The Principle of Subsidiarity' (1996) 6(4) Religion and Liberty <<http://www.acton.org/publicat/randl/article.php?id=200> >accessed 7.7.10

Bredimas, *Methods of Interpretation and Community Law* (North Holland, 1978)

Brett, A., 'Indirect Discrimination in Social Security Schemes'. (1997) 4 Web JCLI.

Brown, L., and Jacobs, F.J., *The Court of Justice of the EC*, (5th edition, Oxford University Press, 2000)

Burley A. M., and .Mattli W, 'Europe before the Court: A Political Theory of Legal Integration', (1993) 47(1) International Organisation

Burrows, N., 'The 1979 Convention on the Elimination of all forms of Discrimination against Women' Netherlands International Law Review (1985) 414-460

Burows, N., and Greaves, R., *The Advocate General and EU law* (OUP, 2007).

Business for New Europe, *Migration – Making it work*, (2013) <[http://www.bnegroup.org/images/uploads/publications/files/LATEST-BNE Paper - Migration Making it Work - May 2013.pdf](http://www.bnegroup.org/images/uploads/publications/files/LATEST-BNE_Paper_-_Migration_Making_it_Work_-_May_2013.pdf)> accessed 16.5.14

C

Callewaert, J., 'The European Convention on Human Rights and European Union law: a long way to harmony', (2009) European Convention on Human Rights Law Review, 779

Canning, K., *Gender History in Practice: Historical Perspectives on Bodies, Class and Citizenship* (Ithaca and London: Cornell University Press, 2006)

Capaldi, N., 'The Meaning of Equality' 'The Meaning of Equality' <http://www.google.co.uk/search?hl=en&source=hp&q=see+Capaldi+N.,+'The+Meaning+of+Equality'+&btnG=Google+Search&aq=f&aql=&oq=&gs_rfai=> last accessed 10 October 2014.

Cappelletti, M., Seccombe M. Weiler J.H.H. *Integration through Law: European and the American Federal Experience: Vol 1: Methods, Tools and Institutions* (Berlin/New York: Walter de Gruyter, 1985)

Cappelletti, M., *The Judicial Process in Comparative Perspective*, (Clarendon Press, Oxford, 1989)

Carrozza, P.G., 'Subsidiarity as a structural principle of international human rights law', (2003) 97 *The American Journal of International law*, 38

Careera, S., 'What does Free Movement mean in Theory and Practice in an Enlarged EU', 11(6) *European Law Journal*, 699-721

Carrubba, C., and Gabel, M., 'Do Governments Sway European Court of Justice Decision-making? Evidence from Government Court Briefs', (2005-6) *Institute for Federalism and Intergovernmental Relations Working Paper* <<http://www.ifigr.org/workshop/fall05/gabel-workshop.pdf>> last accessed 1.1.14

Chinkin, C., 'A Critique of the Public/Private Dimension' (1999) *European Journal of International Law* 10(2) 387-395 at 389 <www.ejil.org/pdf/10/2/588.pdf> accessed 11 March 2010

Christiansen, T., et al, *the Social Construction of Europe*, (Sage, 2001)

J.Christofferson, *Fair Balance: A Study of Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, a PhD thesis <[http://www.humanrights.dk/files/pdf/Disputats%20Endelig%202008%2004%2017%20\(2\).pdf](http://www.humanrights.dk/files/pdf/Disputats%20Endelig%202008%2004%2017%20(2).pdf)> accessed 14.1.14

Cichowski, R. A., 'The Institutionalisation of Sex Equality for Europe: Women Activists and the European Court', (Center for Culture, Organizations and Politics (University of California, Berkeley, 2000)

Cichowski, R., *The European Court and Civil Society – Litigation, Mobilisation and governance*, (Cambridge University Press, 2007) 118

M.Cohn, 'Three Aspects of Proportionality', (2012) Paper presented at VII World Congress of the International Association of Constitutional Law, Mexico City, workshop

Collier, D., Hidalgo, F.D., and Maciuceanu A. 'Essentially contested concepts: Debates and applications', (2006) II 236. *Journal of Political Ideologies* 211-246

Commission Communication to the Council and the European Parliament, (1992) Bulletin EC 10 at 116.

Commission, 'Towards European Citizenship: the granting of special rights', COM (75) 321 final.

Commission in its Report, 'Dismantling the obstacles to EU citizens rights', COM (2010) 603 final at 3

Commission, 'EU Charter is making fundamental rights a reality for citizens', IP/13/411 http://europa.eu/rapid/press-release_IP-13_411_en.htm > accessed 29 May 2013

Commission, 'Family matters and succession' < http://ec.europa.eu/justice/civil/family-matters/index_en.htm > accessed 8.2.15

Commission of the Bishops' conferences of the European Community, *A Family Strategy for the European Union: An encouragement to make the family an EU priority* (COMECE, 2004) A.Pfenning and T.Bahle, *Families and Family Policies in Europe: comparative Perspectives*, (Frankfurt am Main: Peter Lang, 2000)

Conant, L., *Justice Contained: Law and Politics in the EU*, (Ithaca, NY, Cornell University Press, 2002)

Conway. G., 'Conflicts of Competence Norms in EU Law and the Legal Reasoning of the ECJ' 11 (9) *German Law Journal* at 967-1005

Conway, G., 'Levels of Generality in the Legal Reasoning of the European Court of Justice', (2008) 14(6) *European Law Journal* 787-805

Conway, G., *The Limits of Legal Reasoning and the European Court of Justice*, (CUP, 2012)

Conway, G., 'Judicial Interpretation and the third pillar', (2005), 13(2) *European Journal of Crime, Criminal Law and Criminal Justice*, 255-283

Coppell and O'Neil, 'the ECJ: taking rights seriously' (1992) 29 *CMLRev* 669

Couts, S., 'Citizenship of the European Union', in D.Arcarazo and C.Murphy, *EU Security and Justice Law after Lisbon and Stockholm*, (Hart Publishing, 2014)

Craig, P., 'The Charter, the CJEU and National Courts', in D.Ashiagbor, N.Countouris and I.Lianos, (eds) *The European Union after the Treaty of Lisbon*, (Cambridge University Press, 2012)

Craig, P., 'Competence, Clarity, Containment and Consideration' (2004) 29 *European Law Review* 85

Craig, P., (2010) *The Lisbon Treaty: Law, Politics, and Treaty Reform*, (Oxford: Oxford University Press)

Craig, P., and de Búrca, G., *EU Law Text, Cases and Materials*, 2nd Edition., Oxford, Oxford University Press, 1998)

Craig, P., and de Búrca, G., *EU Law: Text, Cases and Materials*. (3rd ed.,Oxford: Oxford University Press, 2002)

Craig, P., and de Búrca, G., *EU Law: Text, Cases and Materials*. (4th ed.Oxford: Oxford University Press, 2007)

Craig, P., and de Búrca, G., *EU Law: Text, Cases and Materials*. (5th ed., Oxford: Oxford University Press, 2011)

Craig, P., and de Búrca G., *The Evolution of EU Law*, (2nd ed. OUP, 2011) at 146

Craig, P., 'Proportionality, Rationality and Review', (2011) *Oxford Legal Studies Research Paper No. 5/2011*

Eugene D. Cross, 'Pre-Emption of Member State Law in the European Economic Community: A Framework for Analysis', (1992) 29 *Common Market Law Review* 447

Crosthwaite, J., 'Subsidiarity and Philosophy', (1993) 5 *Philosophy Now* at 24

Cryer, R, Hervey, T, and Sokhi-Bulley, B., *Research Methodologies in EU and International Law*, (Hart Publishing, 2011)

D

T.Dalessio, 'the Social Dimension of EU Citizenship – A Castle in the Air or Construction Gone Wrong? (2013) 14(7) *German Law Journal*

Daly, M., and Lewis, J. (2000) 'The Concept of Social Care and the Analysis of Contemporary Welfare States', *British Journal of Sociology* 51 (2): 281–98 at 289

Dashwood, A., Worthington, S., and Ward, A., *Cambridge Yearbook of European Legal Studies*, (University of Cambridge Centre for European Legal Studies, Hart Publishing ,2000)

Dashwood, A., and O'Leary, S., (eds), *The Principle of Equal Treatment in EC law. A collection of Papers by the Centre for European Legal Studies*, (Cambridge, Sweet & Maxwell, 1997)

Dashwood A., 'The Limits of European Community Powers'. (1996) 21 EL Rev, 113-128

Davies, D., 'Subsidiarity: the wrong idea, in the wrong place at the wrong time', (2006) 43 CMLRev 78

Davies, P., 'Market Integration and Social Policy in the Court of Justice', (2008) 3 Industrial Law Journal 126

Deakin, S., 'Labour Law as Market Regulation: the Economic Foundations of European Social Policy Chap 4 in P Davies, A Lyon-Caen et al (eds) *European Community Labour Law: Principles and Perspectives Liber Amicorum Lord Wedderburn of Charlton* (Clarendon Press, Oxford, 1996) pp 63-93

Deakin and Morris, *Labour Law* (Hart Publishing, Oxford, 2005)

De Búrca, G., 'The Principle of Proportionality and its Application in EC Law', in (1993) 13 Yearbook of European Law 105–150

De Búrca, G., 'Beyond the Charter: How Enlargement has enlarged the Human Rights Policy of the EU' (2004) Fordham Journal of International Law

De Búrca, G., 'Reappraising Subsidiarity's Significance After Amsterdam' (1999) Harvard Jean Monnet Working Paper 7/99

De Búrca, G., 'The Drafting of the European Union Charter of Fundamental Rights'

De Búrca, G., 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor' (1998) 36(2) *Journal of Common Market Studies*, 217-235

De Búrca, G., 'The principle of proportionality and its application in EC law' (1993) YEL 105.

De Búrca, G., Kochenov, D., and Williams, A., 'Debating Europe's Justice Deficit: the EU, Swabian Housewives, Rawls and Ryanair' EU1 working Paper LAW 2013/11, 2013
<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2354568> accessed 1.3.14

De Búrca, G. and Weiler, J.H.H., *The European Court of Justice*, (Academy of European Law, European University Institute, OUP, 2001)

Defeis, E., 'Human Rights and the ECJ: An Appraisal,' (2007|) 31 Fordham International Law Journal

Dehousse, R., 1992, Does subsidiarity really matter? Florence, European University Institute, EUI Working Paper Law no. 92/32 at 28

Delors et al, *Subsidiarity: the Challenge of Change*: (Maastricht, European Institute of Public Administration, 1991)

Demirci, B., The principle of Subsidiarity in the EU Context – A thesis submitted to the Graduate School of Social Sciences of Middle East Technical University <<http://etd.lib.metu.edu.tr/upload/1074673/index.pdf>> last accessed 14.4.15

De Noriega, A., *The EU principle of subsidiarity and its critique* (OUP, 2002)

De Schutter, O., 'The Balance between Economic and Social Objectives in the European Treaties', (2005) 5 *Revue Francaise des Affaires Sociales* 119-143 at 119 <http://www.cairn.info/article.php?ID_ARTICLE=RFAS_EN605_0119&AJOUT_BIBLIO=RFAS_EN605_0119> last accessed 11.11.14

de Wite, B., Muir, E. and Dawson, M., (eds) *Judicial Activism at the European Court of Justice*,

Dickson, J., and Eleftheriadis, P., *The Philosophical Foundations of the EU*, (OUP, 2012).

Docksey, C., 'The Principle of Equality Between Women and Men and Fundamental Rights Under Community Law'. (1991) *Industrial Law Journal* 20: 258-280

Docksey, C. 'The EC and the Promotion of Equality' in C.McCrudden ed *Women, Employment and European Equality Law* (London 1987)

Donner A.M. 'The Constitutional Powers of the Court of Justice of the European Communities', 11 *CMLRev* 127-140 (1974).

Doe, N., *Law and Religion in Europe: A Comparative Introduction*, (OUP, 2011)

Dougan, M., 'The Treaty of Lisbon 2007: Winning minds, not hearts', (2008) 45 *Common Market Law Review* 617-701

Douglas Scott S., *Constitutional Law of the EU*. (Harlow, Essex, Pearson Education Ltd, 2002)

Douglas-Scott, S., 'EU Admission to the ECHR' 19 *Maastricht Journal of European and Comparative Law* (2012)

Drywood, E., *The Child in EU Asylum and Immigration Law: A Socio-Legal Analysis of regulatory and governance issues*, (Liverpool University, 2010) an unpublished thesis

Dworkin, R., 'Social rules and legal theory', (1972) 81 Yale Law Journal 855-890.

Dworkin, R., 'The Model of Rules I', in: *idem*, *Taking Rights Seriously* (Harvard University Press Cambridge 1987) at 68

Dworkin, R., 'Liberalism', in *A Matter of Principle* (Clarendon Press, 1985) 195

Dworkin, R., 'The Model of Rules I', in: *idem*, *Taking Rights Seriously* (Harvard University Press, Cambridge 1987) 14

Dworkin, R., *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press, 2002)

E.

Eckes, C., 'One Step Closer: EU Accession to the ECHR ' Const. L. Blog (2nd May 2013) (available at <http://ukconstitutionallaw.org>)

Editorial comments, 'The EU's Accession to the ECHR – a No from the ECJ', (2015) Common Market Law Review, 1-16

Edward, Judge David., Oral History: Years on the Courts – Part 1 at 16 < <http://www.law.du.edu/documents/judge-david-edward-oral-history/transcript-2006-05-17-session-4.pdf>> last accessed 2.1.14

Elliott, M., 'Justification, Calibration and Substantive Judicial Review: Putting Doctrine in its Place', *UK Const. L. Blog* (17th September 2013) < <http://ukconstitutionallaw.org/tag/basis-of-judicial-review/>> accessed 20.6.14

Elsmore, M. and Startup, P., 'Union Citizenship: Writing the Future', (2007) 26 YBEL 57.

Emilou, N., *The Principle Of Proportionality in European Law: A comparative Perspective* (Kluwer, 1996)

Endicott, T. 'Proportionality and Incommensurability', in G.Huscriftm B. Miller and G.Webber (eds) *Proportionality and the Rule of Law, Rights, Justification, Reasoning*, (Cambridge University Press, 2014)

Endo, K., *Subsidiarity and its Enemies: To what extent is Sovereignty Contested in the Mixed Commonwealth of Europe*, (Fiesolana: European University Institute, 2001)

Engels C. and Weiss, M., *Labour Law and Industrial Relations at the Turn of the Century – Liber Amicorum in Honour of Professor Dr Roger Blainpain*, (Kluwer Law International, 1998)

Everling N., 'The ECJ as a Decision Making Authority'. (1992) 82 *Michigan Law Review*, 1294.

M.Everson, 'The Legacy of the Market Citizen', in J.Shaw and G.More, (eds) *New Legal Dynamics of the European Union*, (Clarendon Press, Oxford, 1995)

F

Fallon, R., 'The rule of Law as a concept in Constitutional Discourse', (1997) *Columbia law Review* 1-56

Finkelstein, C., 'Introduction to the Symposium on conflicts of Rights', (2001) 7(3) *Legal theory* 235-238;

Finlay, TA., The constitution of Ireland in a changing society in *Constitutional Adjudication in EC and National Law Essays for the Hon Mr Justice TF O'Higgins* (eds) Curtin, D., and O'Keeffe, D., (1992)

Finnis, J., *Natural Law and Natural Rights* (Clarendon Law Series, 1980)

Frank, J., *Law and the Modern Mind*, (Peter Smith Publishing Inc., 1985)

Fredman, S., 'EC Discrimination Law: A Critique'. (1992) 21 *ILJ*, 119-134

Fredman, S., 'The Poverty of Equality: Pensions and the ECJ'. (1996) 25 *ILJ*, 119

Fredman, S., *Women and the Law*, (Clarendon Press, Oxford, 1997)

L.Fuller, *Inner Morality of Law*, (New Haven, London: Yale University Press, 1964) Case C-87/12

G

Gallie, W. B., 'Essentially Contested Concepts', (1956) *Proceedings of the Aristotelian Society* 167-98

J.Gerards, 'Fundamental Rights and Other Interests – Should It Really Make a Difference?' In E.Brems, eds, *Conflicts between Fundamental Rights*, (Antwerpen/Oxford/Portland: Intersentia, 2008) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1435247> accessed 12.6.13 at 675

Gower, M., 'Deprivation of British citizenship and withdrawal of passport facilities – Commons Library Standard Note', <<http://www.parliament.uk/business/publications/research/briefing-papers/SN06820/deprivation-of-british-citizenship-and-withdrawal-of-passport-facilities>> accessed 23.10.14

Gray, J. N., 'On the contestability of social and political concepts', (1977) 5 *Political Theory* 331-349

Greer, S., *The European Convention on Human Rights: Achievements, Problems and Prospects* (2006) 189

Grief, N., 'The Domestic Impact of the ECHR as mediated through Community law', (1991) *Public Law* 555

Groves, D., 'Members and survivors' in J. Lewis (ed) *Women's Welfare Rights* (1984)

Guastaferrero, B., 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause', (2012) Jean Monnet Working Paper 1/12 <<http://centers.law.nyu.edu/jeanmonnet/papers/12/documents/JMWP01Guastaferrero.pdf>> accessed 24.4.13

Guild, E., 'The European Union after the Treaty of Lisbon, fundamental rights and EU Citizenship', Global Jean Monnet /EC Association world conference 25-26 May 2010 <http://ec.europa.eu/education/jean-monnet/doc/ecsa10/guild_en.pdf> accessed 21.5.13

H

Habermas, J., *Between Facts and Norms*, (1996, Trans. W.Rehg., Cambridge: Polity)

Habermas, J., *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (1998, MIT Press)

Hafner, C.D. and Berman, D.H., 'The role of context in case-based legal reasoning: teleological, temporal and procedural', (2002) 10 (1-3) *Artificial Intelligence and Law* pp19-64

Hänsch, K., 'A Reply to Roman Herzog and Lüder Gerken', 3(2) *ECLR* 219-224 (2007)]

Hantrais, L., *Social Policy in the European Union*, (London: Macmillan, 1995)

Hantrais, L., and Letablier, M., *Families and Family Policies in Europe* (Longman, 1996)

Hantrais, L., (1997) 'What is a Family or family life in the EU?' in Guild, E. (ed.) *The Legal Framework and Social Consequences of the Free Movement of Persons in the EU* (Kluwer Law International, The Hague, 1997)

Harbo, T., 'The Function of the Proportionality Principle in EU law', (2010) 16(2) *European Law Journal* 158-185

Hargreaves, S., 'Social Policy Objectives and Indirect Discrimination under Directive 79/7: the Ever-Broadening Margin of Discretion of the Member States'. (1997) 19 *JSWFL*, 353

Hart, H.L.A., *The Concept of Law* (2nd ed., Clarendon Press, 1994)

Hartley, T., 'The European Judicial Objectives and the Constitution of the EU'. (1996) 112 *LQR*, 95

Hartley, T. C., *The Foundations of European Community Law*. (3rd Edition. Oxford, Clarendon Law Series 1994)

Hartley, T., 'The European Court, Judicial Objectivity and the Consitution of the Euroepan Union', (1996) 112 *Law Quarterly Review* 95-109 at 95.

Held, D., *Models of Democracy*, (Polity Press, Cambridge, 1996) at 176

Hervey, T. & Kenner, J., 'Economic and Social Rights Under the EU Charter of Fundamental Rights? A Legal Perspective', (2004) *European Law Review*

Herzog, R., and Gerken L: 'Stop the European Court of Justice', *EU Observer.com*, (2008) <<http://euobserver.com/9/26714> (last accessed 20.6.12)

Hickman, T., 'the Substance and structure of proportionality', (2008) *Public Law* at 694

Hirschl, R., 'The Question of Case Selection in Comparative Constitutional Law', 53 *American Journal of Comparative Law* 144

Hirschl, R, Hegemonic Preservation in Action? Assessing the Political Origins of the EU Constitution, in Weiler and Eisgruber, eds., *Altneuland: The EU Constitution in a Contextual Perspective*, Jean Monnet Working Paper 5/04 <<http://centers.law.nyu.edu/jeanmonnet/archive/papers/04/040501-05.pdf> > accessed 16.7.12

H.M.Government, Review of the Balance of Competences between the United Kingdom and the European Union, Subsidiarity and Proportionality, (December 2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/38852/BoCSubAndPro_acc.pdf> accessed 12.1.15

Hohfeld, W., 'Some Fundamental Legal Conceptions As Applied in Judicial Reasoning', 1913-14 23 *Yale LJ* 16-59 at 55

Holmes, O., "The Path of the Law," in Holmes, *Collected Legal Papers* (New York: Peter Smith, 1952)

Holtmaat, R., 'The possible impact of other international instruments to combat discrimination against women (the case of the CEDAW Convention) < www.e-quality.nl/assets/e-quality/dossiers/.../Paper%20Rikki.doc last accessed 20.2.12

Honohan, I., ' Ius soli Citizenship', <<http://eudo-citizenship.eu/docs/ius-soli-policy-brief.pdf>> accessed 15.3.15

Horsley, T., 'Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?', (2011) *Journal of Common Market Studies* 11-15

Hoskins, C., 'Gender Perspectives in European Integration Theories', Paper presented at EUSA conference, Nashville, Tennessee, 27-29 March 2003 < http://aei.pitt.edu/6504/01/001501_1.PDF> accessed 5 November 2008

Howard, E., 'Equality: A Fundamental Right in the EU', (2009) 10 International Journal of Discrimination and the Law

Huscroft, Grant and Miller, Bradley W. and Webber, Grégoire, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014)

Hutchinson, T., and Duncan, N., 'Defining and Describing What We Do: Doctrinal Legal Research', (2012) 17 (1) Deakin Law Review, 84-119

I

Information Centre about Asylum and Refugees, *Refugee Rights and Responsibilities in the UK*, A research project co-ordinated by the Information Centre about Asylum and refugees and supported by the Sigrid Rausing Trust. <<http://www.icar.org.uk/Refugee%20Rights%20and%20Responsibilities%20in%20the%20UK%20Final%20Report.pdf>> accessed 6.1.14.

Inge Harbo, T., 'The function of the Proportionality Principle in EU law', (2010) 16 (2) European Law Journal 158-185

Interinstitutional Agreements of 25 October 1993 on the procedures for implementing the principle of subsidiarity OJ C 329, 6.12.1993 at 135

Irons, C.J., 'A Feminist Looks at Ronald Dworkin's Theory of Equality', (1993) Vol 1 No 1 at <<http://www.murdoch.edu.au/elaw/issues/v1n1/iorns113.html>> accessed 20 June 2010 part 1

J

Jans, J.H., 'Proportionality Revisited', (2000) 27(3) Legal Issues of European Integration 239-265 at 240 and at 243-5 for a discussion of the Court of Justice case law in this context.

Jansson, M and Kalimo, H., 'De minimis meets "market access": Transformation in the substance – and the syntax- of EU Free Movement Law, (2014) 51 Common Market Law Review 523-558

Jaklic, K., *Constitutional Pluralism in the EU*, (Oxford: OUP, 2014)

K

Kant, I., *Ground work for the Metaphysics of Morals*, (1785) edited and translated by A.Wood, (Yale University Press, 2012) 10.

Kant, I. (1997) *Lectures on Ethics*, ed. P. Heath and J.B. Schneewind, trans. P. Heath, (Cambridge: Cambridge University Press)

Keller, M., Edelstein, W., Krettenauer, T., Fu-Xi, F. and Ge, F., 'Reasoning about Moral Obligations and Interpersonal Responsibilities in Different Cultural Contexts',
<www.mpib-berlin.mpg.de/en/institut/dok/full/Keller/moralobl/Kell_moralobl.pdf>

Kelly, P., *Liberalism* (Wiley, 1994)

Kenner, J., 'EC Labour Law: The softly, softly, approach' (1995) 11 (4) *International Journal of Comparative Labour Law and Industrial Relations* 307-326

Kiiver, P., 'The Lisbon Judgment of the German Constitutional Court: A Court-Ordered Strengthening of the National Legislature in the EU, (2010) 16 (5) *European Law Journal* 578-588.

King, L., 'Hidden Fathers? The significance of fatherhood in mid-twentieth-century Britain', (2012) 26(1) *Contemporary British History* pp.25-46.

Klamert, K., *The Principle of Loyalty in EU law*, (Oxford Studies in European Law, 2014)

Klatt, M., and Meister, M., *The Constitutional Structure of Proportionality*, (2012, OUP)

Kochenov, D., 'A Real European Citizenship: A New Jurisdiction Test: A Novel chapter in the Development of the Union in Europe', (2011) 18 *Columbia Journal of European Law*

D.Kochenov, *EU Citizenship without Duties* (September 10, 2013), (2014) *European Law Journal* (Forthcoming); University of Groningen Faculty of Law Research Paper 15/2013. Available at SSRN: <<http://ssrn.com/abstract=2323273>>accessed 14.2.14.

Kochenov, D., 'Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights', (2009) 15 *Columbia Journal of European law*

Kochenov, D., 'EU citizenship: from an incipient form to an incipient substance? The discovery of the treaty text', (2010) 37 (4) *European Law Review* 369

D.Kochenov, EU Citizenship without Duties (September 10, 2013). ELJ 2014 (Forthcoming); University of Groningen Faculty of Law Research Paper 15/2013. Available at SSRN: <<http://ssrn.com/abstract=2323273>> accessed 1.3.14

Kochenov, D., The Present and the Future of EU Citizenship: A Bird's Eye View of the Legal Debate (2012) Jean Monnet Working Papers (NYU Law School) No 2/12 <<http://dx.doi.org/10.2139/ssrn.2063200>> last accessed 12.3.14

Kochenov, D., 'The Right to Have What Rights: EU Citizenship in Need of Clarification', (2013) 19 European Law Journal 3

Koopmans, T., 'The Theory of Interpretation and the Court of Justice', in O'Keefe and Bavasso (eds) *Judicial Review in EU law* (Kluwer, 2000)

Kostakopoulou, D., 'Ideas, Norms and European Citizenship: Explaining Institutional Change', (2005) 2 The Modern law Review 263

Kostakopoulou, D., and Ferreira, N., 'Testing Liberal Norms: the Public Policy and Public Security Derogations and the Cracks in European Union Citizenship', (May 29, 2013), Warwick School of Law, Legal Studies paper No Paper No 2013/18 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2271722>accessed 16.6.14.

Kumm, M., (2006) 'Constitutionalising subsidiarity in Integrated Markets: the Case of Tobacco Regulation in the European Union' (12(4) ELJ 503-533

M.Kumm, 'The Idea of Thick Constitutional Patriotism and its implications for the role and structure of European Legal History', (2005) 6 (2) German law Journal 319

L

Laski, H., *The Rise of European Liberalism*, (George Allen and Unwin ,1936)

K.Lenaerts, 'Upholding Union Values in Times of Societal change: the Role of the Court of Justice of the European Union'. <https://www.dur.ac.uk/resources/deli/events/annual%20lecture%202014/Lenaerts_2014_Durham.pdf>accessed 1.7.14

Lasser, M., *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (OUP, 2004)

Law, D., *Generic Constitutional Law*, 89 MINN. L. REV. 652 (2005)

The Law Society 'A guide to the Treaty of Lisbon', (2010) <[http://www.lawsociety.org.uk/documents/downloads/guide to treaty of lisbon.pdf](http://www.lawsociety.org.uk/documents/downloads/guide%20to%20treaty%20of%20lisbon.pdf)> accessed 13.4.10

Leczykiewicz, D., 'The national identity clause in the EU Treaty: a blow to supremacy of Union law?', <http://ukconstitutionallaw.org/2012/06/21/dorota-leczykiewicz-the-national-identity-clause-in-the-eu-treaty-a-blow-to-supremacy-of-union-law/>> accessed 10.5.13

Lewis, C. and Lamb, M., *Understanding fatherhood: A review of recent research*, (Joseph Rowntree Foundation, York, 2007)

Lock, 'EU Accession to the ECHR: implications for the judicial review in Strasbourg', (2010) *European Law Review* 16

Lock, T., 'Beyond *Bosphorus*: The European Court of Human Rights' Case law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights', (2010) 10(3) *Human Rights Law Review* 529-545

Locke, J., *Two treatises of Government* P.Laslett (ed.) (Cambridge University Press, 1988)

Luckhaus, L. and Hoskyns, C., 'The European Community Directive on Equal Treatment in Social Security'. (1989) 17(4) *Policy and Politics*, 321

M

Macdonald, S. and Mielsson, G., 'Linkages between the Concepts of subsidiarity and sovereignty', Paper prepared for presentation at the European Community Studies Association Fourth Biennial Conference in Charleston, S.C., May, 1995. <http://aei.pitt.edu/6961/01/macdonald_scot.pdf> accessed 1 June 2010

Maduro, M., (1999), 'Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU', in Alston, P. (ed.), *The EU and Human Rights*, (Oxford, OUP, 1999)

Maduro, M., 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' (2007) 1(2) *European Journal of Legal Studies* <<http://www.ejls.eu/index.php?id=2>> last accessed 10.7.10

Maduro, M., *We the Court, the European Court of Justice and the European Economic Constitution* (Hart Publishing, 1998) 54-58

Marks, G., Hooghe, L. and Blank, *Integration Theory, Subsidiarity and the Internationalisation of Issues: the Implications for legitimacy*, EU1 working Paper RSC, 95/7 (European Union Institute, Florence, 1995)

Marsden, Dr P., 'Checks and balances: EU competition law and the rule of law', February 2009 *Competition Law International*

Marshall, T., *Citizenship and Social Class*, (Cambridge: Cambridge University Press, 1950)

Mayoral, J., 'Democratic improvements in the EU under the Lisbon Treaty, (2011) <<http://www.eui.eu/Projects/EUDO-Institutions/Documents/EUDOREport922011.pdf>> accessed 20.7.12

McBride, J., 'Proportionality and the European Convention on Human Rights', in E. Ellis (ed), *The Principle of Proportionality in the Laws of Europe*, (1999, Hart)

Möller, KI., 'Proportionality: Challenging the Critics', (2012) 10(3) *International Journal of Constitutional Law* 709

J. Monnet, *Memoirs*, (Mayne, Richard Collins, 1978)

Monsma, S., 'The Relevance of Solidarity and Subsidiarity to Reformed Social and Political Thought', <<http://www.calvin.edu/henry/ISSRC/Conferences/Papers/monsma06.pdf>> accessed 13.7.13

Moore, G., 'The Principle of Equal Treatment: From Market Unifier to Fundamental Right? In Craig, P and de Burca, G. (eds) *The Evolution of EU Law*, (Oxford, OUP, 1999)

Morano-Foadi and Andreadakis, S., 'Reflections on the Architecture of the EU after the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights', (2011) 17(5) *European Law Journal* 595-610

Morrell, G., Information Centre about Asylum and Refugees, *Refugee Rights and Responsibilities in the UK*, A research project co-ordinated by the Information Centre about Asylum and refugees and supported by the Sigrid Rausing Trust. <<http://www.icar.org.uk/Refugee%20Rights%20and%20Responsibilities%20in%20the%20UK%20Final%20Report.pdf>> accessed 6.1.14

Morijn, J., 'Balancing Fundamental Rights and Common Market Freedoms in Union Law: *Schmidberger* and *Omega* in Light of the European Constitution', 12(1) *European Law Journal* 15-40 (2006)

Morris, A.J., 'On the Normative Foundations of Indirect Discrimination Law – Understanding the Competing Models of Discrimination Law as Aristolian Forms of Justice'. (1995) 15 *Oxford Journal of Legal Studies* 199-228

Mullaly, S., 'Debating reproductive rights in Ireland', (2005) 27(1) *Human Rights Quarterly* 78 - 104

Murray, J., (ed), *Love, Marriage and Family in the Middle Ages*, (Broadview Press Ltd, 2001)

N

Neill, P., *The European Court of Justice: A Case Study in Judicial Activism*, (London: European Policy Forum, 1995)

Nicolaidis, K., 'We the Peoples of Europe', (2004) 83 *Foreign Affairs* 97-110

Nielson, R. and Sszyszczak, E., *The Social Dimension of the European Communities* (Copenhagen 1991)

Nielson, R. and Sszyszczak, E., *The social dimension of the European Community* (2nd ed Handelshojskolens Forlag, Copenhagen, Collins, 1997)

Niermeyer, J.F., *Mediae Latinitatis lexicon minus* (Leiden, 1984)

O

O'Brien, C., 'I Trade, therefore I am: Legal Personhood in the European Union', (2013) 50 *Common Market Law Review* 1643-1684

Observer article 'National Parliaments show yellow card on EU law right to strike' <<http://euobserver.com/social/116405>> accessed 23.6.13

O'Leary S., 'Putting the Flesh on the Bones of European Union Citizenship' (1999) 24 EL Rev 68, 77-78 and Toner., H 'Judicial Interpretation of European Union Citizenship/ Consolidation or Transformation', (2000) 7 MJ 158

d'Oliveira, J., 'Union Citizenship: Pie in the Sky?', in A.Rosas and E.Antola, (eds) *A citizens' Europe: In search of a New Order* (Sage, 1995)

Oliver, P., *Free movement of Goods in the EC* (4th ed. Sweet and Maxwell, 2002)

Oppenheimer, H., 'Abortion, A sketch for a Christian View', (1992) 5(2) *Studies in Christian ethics* 46-60

Oxford Dictionary (2nd ed. OUP, 1996)

P

Pelkmans, J., 'Testing for Subsidiarity' Bruges European Economic Policy Briefings No 13 <<http://www.coleurop.be/eco/publications.htm> > accessed 12.7.12

Pennings, F., *Introduction to European Social Security Law*. Kluwer Law International, 2001

Perju, V., 'Reason and Authority in the European Court of Justice' (2009) 49(2) *Virginia Journal of International Law* 167-214

Pernice, I., 'The Treaty of Lisbon and fundamental Rights', in Stefan Griller/Jaques Ziller (eds.), *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty*, (Springer Wien New York, 2008)

Pfenning, A. and Bahle, T., *Families and Family Policies in Europe: comparative Perspectives*, (Frankfurt am Main: Peter Lang, 2000) 128

Piris, J. C., *The Lisbon Treaty: A legal and political analysis*, (Cambridge Studies in European Law and Policy, 2010)

Plato' *The Republic Book V*', translated by R.Waterfield (OUP, 1993)

Pojman and Westmoreland., *Equality: Selected Readings* (Oxford University Press, 1997)

Pollack, M.A., 'Creeping Competence: The Expanding Agenda of the Euroepan Community', (1994) 14 (2) *Journal of Public Policy* 95-145

Pollicino, O., 'Legal Reasoning of the Court of Justice in the context of the Principle of Equality Between Judicial Activism and Self-restraint', (2006) 5 (3) *German Law Journal*, <http://www.germanlawjournal.com/pdfs/Vol05No03/PDF_Vol_05_No_03_283-317_European_Pollicino.pdf> last accessed 12.7.10

Pope Leo XIII in 1891 in *Rerum Novarum*, Encyclical on Capital and Labour <http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_en.html> accessed 14.1.14

Pope LeoXII *Rerum Novarum*, Encyclical on Capital and Labour, (1891) <http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_en.html> last accessed 14.1.14
Pope Paul's letter to women.
<http://www.vatican.va/holy_father/john_paul_ii/letters/documents/hf_jp-ii LET_29061995_women_en.html> last accessed 14.1.14

Pope Pius, *Quadragesimmo Anno: Encyclical of Pope Pius XI in Reconstruction of the Social Order*, May 15 1931 in the *Papal Encyclicals 1903-1939* (Raleigh: McGrath Publishing Co, 1981)

Portuese, A., Principle of Subsidiarity as principle of economic efficiency, (2011) *Columbia Journal of European Law*

Poscher, R., 'Insights, Errors and Self-Misconceptions of the Theory of Principles', (2009) 22(4) *Ratio Juris* 425-54

Prechal, S., 'Does direct effect still matter?' 2000 *CMLRev* 37 1047-1069

Preuz, K., Problems of a Concept of European Citizenship, (1995) 1 *European Law Journal* at 271

Punch, K., *Introduction to Social Research: Qualitative and Quantitative Approaches* (London Sage, 1998)

Q

R

G.Radbruch, *Statutory Lawlessness and Supra-Statutory Law*, (translated by B.Litschewski Paulson and S. L Paulson) in (2006) 26(1) Oxford Journal of Legal Studies 1-11

Rasmussen, H., *On Law and Policy in the EU: A Comparative Study in Judicial Policy Making* (Dordrecht: Martinus Nijhoff Publishers, 1986,)

Raucea, C., Fundamental Rights: The Missing Pieces of European Citizenship? [2014] 14 (10) German Law Journal 2021-2040 at 2026.

Rauscher, A ‘Gustav Gundlach, SJ: One of the architects of Christian social thinking’, <<http://www.catholic.net/rcc/Periodicals/Homiletic/2002-10/rauscher.html>> accessed 10.3.13 at 5

Reed, J.W.R ‘Political Review of the ECJ and its jurisprudence’, <http://centers.law.nyu.edu/jeanmonnet/archive/papers/95/9513ind.html> > last accessed 21.7.12

Reich, N., ‘Free Movement v. Social Rights in an Enlarged Union – the *Laval and Viking* cases before the ECJ, (2008) 2 GLJ, 125

Robson, C., *Real World Research*, 2nd edn (Oxford, Blackwell Publishers, 2002)

Ross, A., *Directive and Norms* (New York, Humanities Press, 1968)

Rhodes, M., ‘A Regulatory Conundrum: building a regime for EC Social and Labour Market Policy’, Paper for the EC Studies Association Conference 27-29 May (1993) <http://aei.pitt.edu/7235/1/002485_1.pdf> accessed 20.7.12

Ritzer, C., Ruttloff, M., and Linhart, K., ‘How to Sharpen a Dull Sword – the Principle of Subsidiarity and its Control, (2006) 7(9) German Law Journal, 733-760

Rosas, A., 'The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue', (2007) 1(2) European Journal of Legal Studies <<http://www.ejls.eu/index.php?id=2>> last accessed 10.7.10

Rostgaard, T., 'The Equal Sharing of Caring Responsibilities between women and men', <<http://www.un.org/womenwatch/daw/egm/equalsharing/EGM-ESOR-2008-EP6%20Tine%20Rostgaard.pdf>> accessed 11.6.11

Ruether, R., *Christianity and the Making of the Modern Family*, (Beacon Press, 2001)

Rutherglen, G., 'Title VII Class Actions', (1980) 47 University of Chicago Law Review 713

S

Salter, et al, *Writing Law Dissertations*, (Pearson, 2007)

S.Sánchez, 'Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising alliance or a Dangerous Liaison?', (2014) 20 (4) European Law Journal 464-481

Sandel, M., *Justice*, (Penguin, 2010)

Sauber, L'abate, Weeks and Buchanan, *Dictionary of Family Psychology and Family Therapy*, (2nd ed., SAGE 1993)

Schiek, D., (2006) 'The ECJ Decision in Mangold: A further twist on effects of Directives and Constitutional Relevance of Community Equality Legislation' Industrial Law Journal IRLR143

Schilling, T., 'Subsidiarity as a Rule and a Principle, or: Taking Subsidiarity Seriously', (1995) New York University Jean Monnet Working Paper No. 10/1995

Schlink, B., 'Proportionality in Constitutional Law: why everywhere but here', (2012) 22 *Duke Journal of comparative and International Law* 291

Schütze, R., *From Dual to Cooperative Federalism: The Changing Structure of European Law*, (2009, OUP)

Schütze, R., 'Lisbon and the Federal Order of Competences: A Prospective Analysis' (2008) 33 *EL Review* 709-722

Shaw, J., 'EU Citizenship and the edges of Europe', Working Paper 2012/19

Shaw, K., 'The case of *Álvarez* and the boomerang effect of maternity leave', (2013) 19 (2) *Web Journal of Current Legal Issues*

Shuibhne, N., 'Margin of appreciation: national values, fundamental rights and EC free movement law', (2009) *European Law Review*, at 231.

Shuibhne, N., 'Some of the Kids are All Right', (2012) *Common Market Law Review* 249-380

Shuibhne, N., 'EU Citizenship after Lisbon', in D.Ashiagbor, N.Countouris and I.Lianos, (eds) *The European Union after the Treaty of Lisbon*, (Cambridge University Press, 2012)

Schutze, R., 'Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism?', (2009), 68(3) *Cambridge Law Journal* pp. 525-36.

Siebers, S., *Dividing Lines between the European Union and its Member States* (TMC Asser Press, 2008)

Siedentop, L., *Democracy in Europe* (2000, London, Penguin Group).

Snyder, F., 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques', (1993) 56(1) *Modern Law Review* 19-54

Song, R., *Christianity and Liberal Society*, (Oxford Studies in Theological Ethics, Clarendon Press Oxford, 1997)

Soriano, L., 'A Modest Notion of Coherence in Legal Reasoning. A Model for the European Court of Justice', (2003) 16(3) *Ratio Juris* 296-323

Spaak, T., *The Concept of Competence* (Ashgate, 1994)

Spaak, T., 'Norms that Confer Competence', (2003) 16(1) *Ratio Juris* 89-104

Spaak, T., 'Guidance and Constraint: The Action-Guiding Capacity of Neil MacCormick's Theory of Legal Reasoning', (2007) 26(4) *Law and Philosophy* 343-376

Spaventa, S.E., '[The Horizontal Application of Fundamental Rights as General Principles of Union Law](#)' in Arnull, A., Barnard, C., Dougan, M. and Spaventa, E., (eds) *A Constitutional Order of States – Essays in Honour of Alan Dashwood*, Arnull, (Oxford: Hart Publishing, 2011) 199-218

Spicker, P., 'The Principle of Subsidiarity and the social policy of the EC' (1991) 1(3) *Journal of European Social Policy*, 3-14.

Spielmann, Judge D., 'Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review', (CELS Working Paper, OUP) <http://www.cels.law.cam.ac.uk/cels_lunchtime_seminars/Spielmann%20-%20margin%20of%20appreciation%20cover.pdf> accessed 1.7.13.

Spinelli, A., Towards the European Union (1983) Sixth Jean Monnet conference, 13 June 1983, Europe Documents, Agence Internationale, Brussels pp 1-9.

Stalford, H., *Children, Citizenship and Free Movement in the EU: A Socio-Legal Analysis of the Educational Status and Experiences of the Children of EU Migrant Workers*, (2001) PHD Thesis submitted to University of Leeds

H.Stalford, *Children and the EU*, (2012, Hart Publishing)

Stalford, H.E., 'The citizenship status of children in the European Union', (2000) 8(2) *International Journal of Children's Rights*, 101-31

Stasinopoulos, P., 'EU Citizenship as a Battle of the Concepts: Travailleur v Citoyen', (2011) 4 (2) *European Journal of Legal Studies* at 78

Steiner, J., 'Subsidiarity under the Maastricht Treaty', in O'Keefe and Twomey (eds.) *Legal Issues of the Maastricht Treaty* (Chancery, 1994) 39-40.

C. Steinorth, "Üner v The Netherlands: Expulsion of Long-term Immigrants and the Right to Respect for Private and Family Life" (2008) 8 H.R.L. Rev. 185

Stone Sweet, A., *The Judicial Construction of Europe*. (Oxford, Oxford University Press, 2004)

Stone Sweet, A., and Brunnell, T., The European Court and the national courts: A Statistical analysis of preliminary references, 1961-95 Jean Monnet Working Paper No 14/97

Stone Sweet, A., and Mathews, J., 'Proportionality Balancing and Global Constitutionalism', (2008) *Columbia Journal of Transnational Law* 76

M.Suszycka-Jasch and H.Jasch, 'The Participation of the German Lander in the formulation of German-EU policy', (2009) 10(9) German Law Journal 1215 - 1256 at 1238.

Swaine, E., 'Subsidiarity and Self-Interest: Federalism at the European Court of Justice', (2000) 41 (1) Harvard International

M.Schwartzman, 'The Principle of Judicial Sincerity, (2008) Virginia Law Review, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=931435> accessed 14.1.14

Swann, D., *The Economics of the Common Market* (3rd ed. Harmondsworth, Penguin, 1975)

Swanton, C., 'On the essential contestedness of Political Concepts', (1985) (4) Ethics 811-827

T

Tamanaha, B., *On the Rule of Law: History, Politics, Theory*, (Cambridge University Press, 2004)

Taylor Goody, P., 'Welfare State Regimes and Welfare Citizenship', (1991) 1 (2) Journal of European Social Policy 93-105.

Ter Haar, Band . Copeland, P., 'What are the future prospects for the European Social Model? An analysis of EU equal opportunities and employment policy' (2002) 16(3) European Law Journal 1

Timmermans. Subsidiarity and Transparency 22 Fordham International Law Journal 106.

Toth, A.G., The Principle of Subsidiarity in the Maastricht Treaty, (1992) 29 Common Market Law Review 1079 at 1105.

Toth, A.G., 'A Legal Analysis of Subsidiarity', Bull.EC.10-1992 at 116;

Tridimas, T., 'Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny', in E.Ellis *The Principle of Proportionality in the Laws of Europe*, (Hart Publishing, 1999)

Tridimas, T., *The General Principles of EC Law*, (2006, 2nd ed., Oxford, OUP)
Tsakyrakis, S., 'An Assault on Human Rights?', (2010) 7 International Journal of constitutional Law.

V

Vaca, C., 'EU Citizenship before the CJEU: On the importance of the application of the proportionality principle', (2013) 5 (1) Perspectives on Federalism

Vanhoonacker, S., The European Parliament and European Political Union, in The Intergovernmental Conference on Political Union (Laursen, F. and Vanhoonacker, S., eds, 1992) 215.

Vankersbergen, K., and Verbeek, B., 'The Politics of subsidiarity in the EU' (1994) 32 JCMS 215

Vankersbergen, K., and Verbeek, B., 'Subsidiarity as a Principle of Governance in the European Union', (2004) 2 Comparative European Politics, 142-182

Vachez, A., *Integration-through-law: contribution to a Socio-history of EU Political commonsense* <http://www.eui.eu/RSCAS/WP-Texts/08_10.pdf> accessed 1.7.13.

Vachez, A., 'The transnational politics of judicialization: Van Gend en Loos and the making of EU polity', (2010) 16(1) European Law Journal 1-28

Vesterdorf, B., 'A constitutional court for the EU?' President of the Court of First Instance of the European Communities <http://www.ecln.net/elements/conferences/book_berlin/vesterdorf.pdf> accessed 1.8.12

Vischer, R., 'Subsidiarity as a principle of Governance: Beyond Devolution', <<http://mirrorofjustice.blogspot.com/mirrorofjustice/vischer/beyonddevolution.pdf>> accessed 7 June 2010

W

Waddington, L., 'The Court of Justice Fails to Show its Caring Face'. (1997) 22 European Law Review, 587.

Waldron, J., Law and Disagreement (Oxford University Press, 1999),

Waldron, J., 'Is the Rule of Law an Essentially Contested Concept (in Florida)?', (2002) 21(2) Law and Philosophy 137-164 at 154.

J. Waldron, 'Rights in Conflict', (1989) 3 Ethics 503-519.

Waldron, J., 'Security and Liberty: The Image of balance', (2003) 11(2) Journal of Political Philosophy 191-210.

Weiler, J., 'The transformation of Europe' (1991) 100 Yale Law Journal 2403

Weiler, J., 'The Rule of Law as a Constitutional Principle of the European Union', Jean Monnet Working Paper No 4 (New York, 2009)

Weiler, J., 'The State "über alles"; Demos, Telos, and the German Maastricht Decision', 1995 NYU Jean Monnet Working Paper No. 6/1995. <<http://www.jeanmonnetprogram.org/papers/95/9506ind.html>> last accessed 5.5.11 at 11

Wiener A., and Diez, T., (eds) *European Integration Theory*, (2nd ed., OUP, 2012).

Williams-Elegbe Dr. S. and Ojomo, E., *Introduction to Legal Research*, <<http://www.yararena.org/uploads/Introduction%20to%20Legal%20Research%20.pdf>> accessed 3.7.14

Westen, P., 'The empty idea of equality', (1992) 95(3) Harvard Law Review

Wetherill, S., 'Competence Creep and Competence Control (2004) 23 Yearbook of European Law 1-55

Wetherill, J., 'Better Competence Monitoring', (2005) 30 European Law Review 23.

White, R., *EC Social Security Law*. (Harlow, Essex, Longman, 1999).

White, R., and Boussiakou, I., 'Separate Opinions in the European Court of Human Rights', (2009) 9(1) 37-60.

White, R., 'A New Era for Human Rights in the European Union?', (2011) Oxford Yearbook of European Law

White, T.J., 'Catholicism and Nationalism in Ireland: From fusion in the nineteenth century to separation in the twenty-first century', <https://www.westminster.ac.uk/_data/assets/pdf_file/0020/20099/004WPCC-Vol4-No1-Timothy_J_White.pdf> last accessed 1.1.14.

Wiesbrook, AS., 'Union Citizenship and the Redefinition of the internal Situations rule: the Implications of Zambrano', [2011] 12(11) German law Journal 2094

Wilke, M., and Wallace, H., *Subsidiarity: Approaches to Power-Sharing in the European Community*, (London: Royal Institute of International Affairs, 1990).

Williams, A., 'Taking Values Seriously: Towards a Philosophy of EU Law', (2009), Oxford Journal of Legal Studies pp 1-29

Williams, O.F., Catholic Social Teaching: A Communitarian Democratic Capitalism for the New World Order, in Williams, O. and Houck, J. W, (eds) *Catholic Social Thought and the New World Order: Building on One Hundred Years*, (Notre Dame: University of Notre Dame Press, 1993)

Wils, W.P.J., 'The Search for the Rule in Article 30 EEC: Much Ado about Nothing?' (1993) 18 *European Law Review* 475

Woolenschlager, F., 'Union Citizenship and Its Dynamics for Integration beyond the market', paper presented at the EUSA Eleventh Biennial International Conference 2009
<http://www.unc.edu/euce/eusa2009/papers/wollenschl%C3%A4ger_05E.pdf >
last accessed 17.6.13

Wyatt, D., 'The Growing Competence of the European Community', (2005) 30 *European Law Review* 23

Y

Yin, R.K., (2009) *Case Study Research Design and Methods* (4th ed. SAGE, 2009)

Z

Zbiral, R., 'Restoring Tasks from the EU to the Member States: A Bumpy Road To An Unclear Destination', (2015) *Common Market Law Review* 51-84.

Zilbershats, Y., 'Reconsidering the Concept of Citizenship', (2001) *Texas International Law Journal* 689

Zucca, L., 'Does the European Constitution Need Christian Values?', (2004) 24 *Oxford Journal of Legal Studies*, pp 739-748

Reports

Report from the Commission, Annual Report 2013 on Subsidiarity and Proportionality (2014) 505 final

Draft opinion of the Committee on Constitutional Affairs for the Committee on Legal affairs on the annual reports 2012-2013 on subsidiarity and proportionality (2014/2252(INI))

